APPENDIX

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN,

Petitioner,

v.

CARLISLE & JACQUELIN, et al.

On Writ of Certiorari to the United States Court of Appeals
For the Second Circuit.

Petition for Certiorari Filed July 30, 1973.
Certiorari Granted October 15, 1973.

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DISTRICT COURT DOCKET ENTRIES
No. 66 Civ. 1265

5- 2-66 Filed complaint and issued summons.

5-10-66 Filed summons & return, served all defts. 5-4-66.

5-13-66 Filed stip. & order extending defts' time to answer to 6-24-66—McLean, J.

6- 8-66 Filed Pltff's notice of taking deposition of Henry I. Cobb, Jr.

6- 8-66 Filed Pltff's notice of taking deposition of deft. DeCoppet & Doremus by Reginald P. Rose.

6- 8-66 Filed Pltff's notice of taking deposition of deft. Carlisle & Jacquelin by Van R. Halsey.

6-15-66 Filed stip & order adjourning deposition of Carlisle & Jacquelin to 7-25-66, 7-27-66 & 8-30-66 as indicated—Tenney, J.

6-17-66 Filed Deft's interrogs.

6-27-66 Filed Answer of deft. Carlisle & Jacquelin.

6-28-66 Filed Answer of DeCoppet & Doremus.

6-30-66 Filed Answer of deft. New York Stock Exchange.

6- 5-66 Filed Pltff's answers to defts' interrogs.

7- 6-66 Filed defts (Carlisle) affdt & notice of motion—Re: action is not maintainable as a class action—Ret. 7-12-66.

7- 6-66 Filed defts' memorandum in support of motion.

7- 8-66 Filed pltff's affdvt. in opposition to deft's motion by Robert Zicklin.

7- 8-66 Filed pltff's affdvt. of Morton Eisen in opposition to defts' motion.

7- 8-66 Filed pltff's memorandum in opposition to defts' motion.

5-19-66 Filed stip. & order adjourning depositions of deft. by Van. R. Halsey, et al to 9-26-66; 9-28-66 & 9-30-66 respectively—Wyatt, J.

9-27-66 Filed stip. & order adjourning depositions of deft. Carlisle & Jacquelin by Van R. Halsey, deft. DeCoppet & Doremus by Reginald P. Rose & Witness Henry I. Cobb, Jr. to 10-26-66, 10-28-66 & 10-31-66 respectively—Tyler, J.

7-12-66 Filed reply memorandum in support of motion for order determining action to be a class action (filed in court).

9-30-66 Filed Opinion #32,793—Defts' motion is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of pltff. Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of pltff. individually—It is so ordered—Tyler, J.—mailed notice.

10-10-66 Filed pltff's affdvt. & notice of motion—Resettle order—Ret. 10-25-66.

10-10-66 Filed memorandum of pltff in support of its motion.

10-21-66 Filed defts' memorandum in opposition to motion for amendment & resettlement of order to include statement under 28 U.S.C.1292(b).

10-25-66 Filed stip & order adjourning depositions of deft & Henry I. Cobb, Jr. to 1-24-67 & 1-26-67 & 1-30-67—MacMahon, J.

10-25-66 Filed memo—endorsed on motion dated 10-10-66 —motion for resettlement is denied—so ordered—Tyler, J. mn

10-26-66 Filed pltff's reply memorandum in support of its motion.

10-28-66 Filed bond for security for costs—US Fidelity & Guaranty Co.

10-28-66 Filed pltff's notice of appeal—mailed copies to Carter, Ledyard & Milburn, Kelley Drye, Newhall M&W—& Milbank Tweed Hadley & McCloy.

12- 7-66 Filed stip & order extending pltffs time to docket record on appeal to 11-16-67—Palmieri, J.

1- 9-67 Filed stip & order adjourning depositions of deft Carlisle & Jacquelin et al to be held on dates indicated—Mansfield, J.

2-24-67 Filed certification of record on appeal.

4-24-67 Filed stip & order adjourning depositions of deft's Carlisle & Jacquelin et al to be held on dates indicated—Frankel, J.

11-13-67 Filed stip & order adjourning depositions of defts' Carlisle & Jacquelin et al to be held on dates indicated—Ryan, J.

4- 3-68 Filed stip and Order that pltffs. depositions of deft. Carlisle & Jacquelin by Van R. Halsey, of deft. DeCoppet & Doremus by Reginald P. Rose and of witness Henry I. Cobb, Jr., which

were previously adj. to April 8, April 10, and April 12, 1968 are further adj. to be held on September 25, September 27, and September 30, 1968, same time and place—Tyler, J. so ordered.

4-10-68 Filed Opinion and Order from USCA that the order is reversed and that the action is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant. m/n

6-28-68 Filed transcript of record of proceedings of June 7, 1968.

8- 6-68 Filed stip and order ext. time to Sept. 4-68 and Oct. 15-68 to exchange of informal requests for admissions. Tyler, J.

9- 9-68 Filed deft's affidavits and notice of motion to disqualify pltffs' attys ret. 9-17-68.

9- 9-68 Filed deft's memorandum in support of their motion ret. 9-17-68.

9-25-68 Filed stip and order pltff's depositions of deft's Carlisle & Jacquelin, DeCoppet & Doremus & witness Henry I. Cobb, Jr., are further adjourned to 1-15-69, 1-17-69 and 1-20-69. So ordered. Bryan, J.

9-27-68 Filed pltff's affidavit by Robert Zicklin in connection with deft's motion to disqualify pltff's attorneys.

9-26-68 Filed memo—endorsed on motion filed Sept. 9-68. This motion is withdrawn in open court today after Pomerantz, Levy, Haudek & Block and Laventhall & Zicklin withdraw as counsel for

plaintiff in this action. It is so ordered. Tyler, J.

2-13-69 Filed pltff's designation of trial counsel.

4-10-69 Filed pltff's attorneys notice of appearance.

8-22-69 Filed transcript of record of proceedings before Tyler, Jr., J. dated 9-26-68.

10-22-69 Filed pltff's interrogs.

10-28-69 Filed stip that the time which the deft's may object to pltff's interrogs is ext. to 11-6-69.

11-10-69 Filed stip & order that deft's may object to pltff's interrogs is ext. until 11-21-69. So ordered. Murphy, J.

11-17-69 Filed deft's (The "Exchange") answers to interrogs.

4-17-70 Filed affidvt of Wm E. Jackson, attys for deft NY Stock Exchange in response to pltff's motion pursuant to Rule 2.

4-17-70 Filed Memo Endorsed on affdvt of Wm E. Jackson, "Motion denied w/o prejudice to a new motion for assignment under rule 2 to a judge for all purposes after Judge Tyler resolves the matter remanded by the Court of Appeals and such resolution becomes final. It is so ordered: Sugarman, Ch J." m/n

4-17-70 Filed Pltff's affdvt & Notice of motion for an order assigning this action to Tyler, J. for all purposes. — Endorsement entered this day above.

7-13-70 Filed Transcript of record of proceedings, dated March 16, 1970.

8-19-70 Filed Transcript of record of proceedings, dated June 19-70.

8-19-70 Filed Transcript of record of proceedings, dated April 30, 1970.

10- 9-70 Filed Opinion #37118 by Tyler, J. "• • • This Court is unable to decide upon the present record the class action motion at this time, and this memorandum should in no way be construed as even a tentative view on the merits of that question. Further information from the parties will be required so that all possible aspects of the class action may be examined and determined. Accordingly counsel are directed to appear at a conference in Room 2704 on 10-16-70 at 12 noon in order to discuss the matters set forth above and any other items they deem pertinent to the class action determination. It is so ordered. Tyler, J. (mailed notices)

1-13-71 Filed affdvt of Russell E. Brooks, atty for deft. in response to the opinion and order of the Court filed Oct. 9, 1970 etc.

1-12-71 Filed affdvt of Richard Allan, atty for deft DeCoppet & Doremus.

1-13-71 Filed defts' supplemental memorandum in support of motion to dismiss this action as a class action.

4- 7-71 Filed Opinion #37524. Tyler, J. The defendants motion to dismiss is denied; This case may be maintained as a class action, and the Court orders a further hearing to determine

who should pay for the Notice pur. to Rule 23. (59 pages) (mailed notices)

5-25-71 Filed affdvt of Mordecai Rosenfeld atty for pltff.

5-25-71 Filed pltff's reply memorandum.

5-25-71 Filed defts' proposed findings and conclusions.

5-25-71 Filed defts DeCoppet & Doremus & New York Stock Exchange in support of motion to dismiss this action as a class action.

5-25-71 Filed pltff's proposed findings of fact and brief in opposition to defts' motion to dismiss.

5-25-71 Filed deft Carlisle & Jacquelin post-hearing brief.

5-25-71 Filed pltff's reply memorandum.

5-25-71 Filed pltff's proposed findings of fact and brief in opposition to defts motion to dismiss.

5-25-71 Filed deft Carlisle & Jacquelin post-hearing brief.

5-25-71 Filed defts' proposed findings and conclusions.

5-25-71 Filed defts DeCoppet & Doremus and New York Stock Exchange in support of motion to dismiss this action as a class action.

5-25-71 Filed defts' supplemental memorandum in support of motion to dismiss this action as a class action.

5-25-71 Filed pltffs supplemental memorandum.

5-25-71 Filed defts' memorandum responding to questions of opinion filed Oct. 9, 1970.

5-25-71 Filed affdvt of Richard Allan atty for defts. Decoppet & Doremus.

5-25-71 Filed affdvt of Russell E. Brooks atty for deft. New York Stock Exchange.

5-25-71 Filed affdvt of Arthur J. Galligan atty for twenty states, the Dist. of Columbia etc.

5-25-71 Filed affdvt of Mordecai Rosenfeld atty for the pltff.

5-25-71 Filed stipulation Number 1, Defts Exhibit A.

5-25-71 Filed stipulation No. 2, Defts Exhibit B.

5-25-71 Filed Transcript of record of proceedings, dated 4-30-70.

7-30-71 Filed pltff's notice to produce.

7-30-71 Filed pltff's notice to produce.

7-30-71 Filed pltff's interrogs.

7-30-71 Filed pltff's interrogs.

8-23-71 Filed Transcript of record of proceedings, dated 5-17-71.

11-10-71 Filed Affdvt of Herbert E. Milstein.

11-19-71 Filed Order—Adjourned to Review calendar for May 16 1972. Edelstein Ch J. m/n

12-15-71 Filed Memorandum by Tyler, J.—"Accordingly, it is ruled that the office of Harold E. Kohn, P.A. may participate in this case as co-counsel for pltff effective today." (mailed notices)

12-15-71 Filed Defts' reply memorandum in support of request to deny application of Kohn firm to participate in this action.

12-15-71 Filed Pltff's memorandum in opposition to defts' request that the Kohn firm be disqualified to act as co-counsel for pltff.

12-15-71 Filed Memorandum in support of application for leave to appear pro-hac-vice.

12-15-71 Filed Letter dtd 11-24-71 from Carter, Ledyard & Milburn to Tyler J.

12-15-71 Filed Letter dtd 11-19-71 from Milbank, Tweed, Hadley to Tyler J.

12-15-71 Filed Letter dtd 12-9-71 from Mordecai Rosenfeld to Tyler, J.

12-15-71 Filed Letter dtd 11-24-71 from Mordecai Rosenfeld to Tyler, J.

12-15-71 Filed Affdvt of Herbert Milstein from office of Harold Kohn.

12-23-71 Filed Transcript of record of proceedings, dated 10-1-1971.

4- 4-72 Filed Opinion #38398 by Tyler, J.—Including Findings of Fact & Conclusions of Law. "On the basis of this opinion, it appears that pltff and the class he represents are more than and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment. Rule 56 FRCP. I conclude, therefore, that defts should bear 90% of the costs of R. 23 (c) (2), FRCP notice to the class. Of defts' share, one-half should be borne by the Exchange and one-half by the odd-lot defts. The remaining 10% which represents the "hazards of litigation", must be put up by pltff. It is so ordered. Tyler J." (mailed notices)

4- 4-72 Filed Pltff's brief on the allocation of the cost of notice.

4- 4-72 Filed Pltff's brief on the allocation of the cost of notice.

4- 4-72 Filed Defts' post-hearing memorandum.

4- 4-72 Filed transcript of record of proceedings of Dec. 13, 1971.

4- 4-72 Filed transcript of record of proceedings of Nov. 5, 1971.

4-19-72 Filed Memorandum by Tyler, J.—"For the information of counsel in this case, there are attached two letters dtd 4-8-72 from persons expressing a desire to participate in this suit." (mailed notices)

5- 2-72 Filed true copy of USCA order directing the Clerk of the USDC for SD of NY to transmit the record to the Court of Appeals.

5- 2-72 Filed deft Jacquelin notice of appeal to U.S.C.A. —mailed notices.

5- 9-72 Filed Pltff's Affdvt & motion for an order enforcing a settlement agreement, with Memo Endorsed: "Motion denied for reasons dictated to Court reporter at hearing therein this afternoon. Pending developments in the next few weeks, these papers will remain sealed in the files of the undersigned. Tyler, J." (mailed notices)

5- 9-72 Filed Memorandum & Order.—"I can conceive of no useful or proper purpose to be achieved by including these matters in the appellate record. On the other hand, I see no reason to continue the "sealing" thereof in my chambers. Hence, the dispute is resolved as follows: (1) the

record of the motion and disposition thereof is hereby unsealed with instructions to the Clerk to docket same; and (2) Subject to final approval of the Court of Appeals, & without prejudice to any applications which the parties may care to make to that court, pltff is directed not to include the record of that motion in the record on appeal. It is so ordered. Tyler J. (mailed notice)

5- 9-72 Filed Defts' memorandum in opposition to motion for enforcement settlement agreement.

5- 9-72 Filed Defts' memorandum in support of cross-motion for a protective order.

5- 9-72 Filed Affdvt of Bud G. Holman, atty for deft Decoppet & Doremus.

5- 9-72 Filed Affdvt of Wm. E. Jackson, atty for NY Stock Exchange Inc.

5- 9-72 Filed Defts' notice of cross-motion for a protective order ret. 10-1-71.

5- 9-72 Filed Pltff's reply memo in support of motion to enforce settlement.

5- 9-72 Filed Affdvt of Mordecai Rosenfeld, atty for pltff.

5- 9-72 Filed Pltff's memo in opposition to defts' motion for protective order.

5- 9-72 Filed Pltff's memo in support of motion to enforce settlement.

5-16-72 Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A. for the 2d Circuit on May 16 1972.

5-31-72 Filed Transcript of Record of Proceedings dated 2/9/72.

6-13-72 Filed Plaintiff's Designation of Exhibits.

A True Copy.

JOHN LIVINGSTON, Clerk

By B. EDWARDS
Deputy Clerk

[SEAL]

UNITED STATES COURT OF APPEALS
DOCKET ENTRIES
No. 30934

11-15-66	Filed motion to dismiss
11-15-66	Filed memorandum in support of motion to dismiss
11-18-66	Filed order adjourning motion to dismiss to 12-5-66
12- 1-66	Filed order adjourning motion to dismiss to 12-12-66
12- 2-66	Filed affidavit in opposition to motion to dismiss
12- 2-66	Filed memorandum of appellant in opposition to motion to dismiss
12- 9-66	Filed reply memorandum in support of motion to dismiss
12-19-66	Motion to dismiss denied, Kaufman, CJ
1- 3-67	Filed petition for rehearing and rehearing in banc
1- 6-67	Filed order extending time to file record to 2-27-67
1-13-67	Petition for rehearing denied, Per Curiam
1-13-67	Filed order denying petition for rehearing
1-13-67	Petition for rehearing in banc denied, Per Curiam
1-13-67	Filed order denying petition for rehearing in banc
2-24-67	Filed record (original papers of District Court)
3- 3-67	Filed order extending time to file appellant's brief & appendix to 5-22-67

3-16-67	Certified appendices & proceedings to Millbank, Tweedy, Hadley & McCloy, Esqs. [*sic*]
3-29-67	Filed notice of filing of petition for writ of certiorari
4-21-67	Filed order extending time to file appellant's brief & appendix to 6-30-67
5-11-67	Filed certified copy of order of Supreme Court denying petition for writ of certiorari
6-23-67	Filed order extending time to file appellant's brief & appendix to 7-14-67
7-14-67	Filed application and order granting leave to file appellant's brief not to exceed 62 pages
7-14-67	Filed appendix, appellant
7-14-67	Filed brief, appellant
7-20-67	Filed order extending time to file appellees brief & appendix to 10-2-67
9-22-67	Filed application and order (endorsed) adjourning argument of appeal until a day from 11-6-67 thru 11-9-67 as consisting with other docket demands
10- 2-67	Filed brief, appellees (Decoppet & Doremus and N.Y. Stock Exchange)
10- 2-67	Filed brief, appellee (Carlisle & Jacquelin)
10-27-67	Filed reply brief, appellant
11- 6-67	Argument heard (by: Lumbard, ChJ., Medina & Hays, CJJ)
3- 8-68	Judgment Reversed & Action Remanded, Medina, CJ & jurisdiction retained

3- 8-68 Dissenting in separate opinion, Lumbard, CHJ.

3- 8-68 Filed judgment

4- 9-68 Filed bill of costs

4- 9-68 Issued Mandate (opinion, judgment & bill of costs)

6-20-68 Original record returned to District Court

6-25-68 Filed receipt of return of original record to District Court

5-24-71 Filed motion for an order fixing a briefing schedule, date of oral argument, etc. with proof of service

5-25-71 Filed affidavit in opposition to motion for an order fixing briefing schedule, etc. with proof of service

5-26-71 Filed motion to direct Clerk of Southern District to transmit the record on appeal with proof of service.

6-10-71 Filed order denying motion to set briefing schedule and date for argument of appeal

6-10-71 Filed order denying motion to direct Clerk of District Court to certify and transmit record

4-11-72 Filed motion to direct Clerk of district court to certify and transmit record with proof of service

4-11-72 Filed motion for an order fixing briefing schedule and date for oral argument with proof of service

4-19-72 Filed memorandum in opposition to motion for briefing schedule and hearing with proof of service

4-24-72 Filed reply memorandum in support of motion (appellees), with proof of service

5- 1-72 Filed order denying motion to set briefing schedule, etc.

5- 1-72 Filed order granting motion to direct clerk of USDC to certify and transmit record, etc.

A true copy,

A. DANIEL FUSARO
Clerk

[SEAL]

[Subsequent docket entries in No. 30934 are entered jointly in No. 72-1521, *infra*]

No. 72-1521

5- 9-72 Filed copies of docket entries and notice of appeal

5-16-72 Received record (original papers of district court)

5-17-72 Filed motion to dismiss with proof of service

5-17-72 Filed record (original papers of district court)

5-23-72 Filed motion to supplement original record with proof of service

6- 8-72 Filed memorandum in opposition to motion to dismiss with proof of service

6- 8-72 Filed memorandum in opposition to motion to supplement the original record with proof of service

6-13-72 Filed reply to memorandum in opposition to motion to supplemental original record with proof of service

6-13-72 Filed order directing that motion to dismiss the appeal be respectfully referred to the panel of judges which heard the previous appeal

6-13-72 Filed order directing that motion for leave to supplement the record on appeal is respectfully referred to the panel of judges which heard the previous appeal

6-16-72 Filed appellee's designation of items for inclusion in appendix

6-21-72 Filed supplemental record. (original papers of district court)

6-29-72 Filed order denying motion for leave to supplement the record on appeal

6-29-72 Filed order denying motion to dismiss

7- 3-72 Filed order extending time to file appellants brief and appendix to 7-26-72; appellee's brief to 9-29-72

7-26-72 Filed motion setting a briefing schedule, date of oral argument and for leave to file an oversize brief with proof of service (& in 30934)

8-24-72 Filed order directing appellee's brief to be filed by 9-29-72; appellant's reply brief to be filed by 10-13-72, WHICH is not to exceed 56 printed pages; date of oral argument will not be fixed until after all briefs are in (& in 30934)

8-25-72 Filed brief, defendants-appellees (Appellants) with proof of service (& in 30934)

8-25-72 Filed appendix, defendants-appellees (appellants) with proof of service (& in 30934)

9-29-72 Filed application and order granting leave to file appellee's brief not to exceed 52 pages (& in 30934)

9-29-72 Filed brief, appellee with proof of service (& in 30934)

10-13-72 Filed application and order granting leave to file appellees reply brief not to exceed 27 pages (& in 30934)

10-13-72 Filed reply brief, appellees with proof of service (& in 30934)

12-12-72 Argument heard (by: Medina, Lumbard and Hays, CJJ) (& in 30934)

12-12-72 Order granting leave to file Supplemental Briefs with References to Remand Proceedings before Judge Tyler and 10 days for further Briefing on the issues, but no Reply Briefs will be permitted without leave of the Court (& in 30934)

12-22-72 Filed supplemental statement of appellees with proof of service (& in 30934)

12-22-72 Filed supplemental brief of plaintiff-appellee with proof of service (& in 30934)

5- 1-73 Judgment Revtrsed (& in 30934) Medina, CJ

5- 1-73 Judgment Reversed (& in 30934) Medina, CJ

5- 1-73 Filed judgment (& in 30934)

5-14-73 Filed petition for a rehearing with a suggestion for a rehearing in banc, with p/s

5-15-73 Filed itemized and verified bill of costs, with p/s

5-24-73 Filed order denying petition for rehearing

5-24-73 Filed order denying petition for rehearing in banc

5-24-73 Petition for rehearing in banc denied, Kaufman, CJ with whom Friendly, ChJ., Feinberg, Mansfield, Mulligan, CJJ concur

5-24-73 Concurring in separate opinion, Mansfield, CJ

5-24-73 Dissenting in separate opinion, Hays, CJ

5-24-73 Dissenting in separate opinion, Oakes, CJ with whom Timbers, CJ concurs

5-30-73 Filed motion to stay the mandate, with p/s (& in 30934)

6- 1-73 Filed affidavit in opposition, with p/s (& in 30934)

6- 5-73 Filed motion to disallow costs, with p/s

6-18-73 Filed order granting motion to stay issuance of mandate and entry of itemized and verified bill of costs, etc. to 7-30-73; no bond will be required pending application to Supreme Court for certiorari

6-18-73 Filed order denying motion to disallow certain items of b/costs

8- 2-73 Filed notice of substitution of attorneys: Carter, Ledyard & Milburn are substituted as counsel DeCoppet & Doremus in place and stead of Kelley, Drye, Warren, Clark, Carr & Ellis

8- 2-73 Filed notice of filing of petition for writ of certiorari (SC#73-203)

10-17-73 Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 30934)

[SEAL]

A. DANIEL FUSARO
Clerk

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange similarly situated, alleges

As a First Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

1. That this first cause of action arises under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, §4, 15 U.S.C. §15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

4. That plaintiff is an investor who, from time to time, and since at least 1960, has bought and sold stock registered on said defendant New York Stock Exchange in blocks of less than the ordinary unit of trading, which unit of trading

is, in most cases, one hundred (100) shares; each such block is referred to herein as an "odd-lot."

5. That plaintiff brings this action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on said defendant New York Stock Exchange. Plaintiff's claim and the claims of such persons involve common questions of law and fact and common relief is sought herein. Such persons are so numerous as to make it impossible to bring them all before the Court. Plaintiff will fairly insure the adequate representation of all such persons.

6. That at all times herein mentioned defendants Carlisle & Jacquelin and DeCoppet & Doremus were and still are limited partnerships under New York Partnership Law, Article 8, and member firms of said defendant New York Stock Exchange; each of said defendants Carlisle & Jacquelin and DeCoppet & Doremus is a registered odd-lot dealer on said defendant New York Stock Exchange and, as such, each buys and sells odd-lots for its own account.

7. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus together handle, and have in the past handled, approximately ninety-nine (99%) percent of all odd-lot transactions on said defendant New York Stock Exchange.

8. That the odd-lot transactions of plaintiff and of those on whose behalf plantiff brings this action have been executed with said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

9. That at all times herein mentioned for the defendants Carlisle & Jacquelin and DeCoppet & Doremus did and each still does exact a charge known as a "differential," which it causes to enter into the price of the stock purchased

by or sold to plaintiff and those on whose behalf plaintiff brings this action.

10. That such differential is now twelve and one-half (12½¢) cents per share on all stocks selling below forty ($40) dollars per share and twenty-five (25¢) cents per share on all stocks selling at and above forty ($40) dollars per share.

11. That such differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus in conspiracy and combination with each other and with principal regional stock exchanges.

12. That said conspiracy and combination are in restraint of trade or commerce among the several states and, as such, are illegal under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

13. That as a result of said conspiracy and combination, such differential is and has been greater than it would have been under free competitive conditions.

14. That as a result of such conspiracy and combination, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have been paying for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

As a Second Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

15. That this second cause of action arises under the Sherman Antitrust Act, §2, 15 U.S.C. §2.

16. Plaintiff repeats and re-alleges paragraphs numbered "2" through "14", both inclusive.

17. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus have monopolized, and have combined and conspired to monopolize, dealings in odd-lot transactions in stocks listed on the New York Stock Exchange in violation of the Sherman Antitrust Act, §2, 15 U.S.C. §2.

18. That as a result of such monopolization, the aforesaid differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

19. That as a result of such monopolization, the differential is and has been greater than it would have been under free competitive conditions.

20. That as a result of such monopolization, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those whom plaintiff represents have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than otherwise they would have received for odd-lot sales.

As a Third Cause of Action Against Defendant New York Stock Exchange:

21. That this third cause of action arises under the Securities Exchange Act of 1934, §§6(b), 6(d), and 19(a), 15 U.S.C. §§78f(b), 78f(d), and 78s(a).

22. That this jurisdiction of the Court is based upon the Securities Exchange Act, §27, 15 U.S.C. §78aa.

23. Plaintiff repeats and re-alleges paragraphs numbered "1" through "15", both inclusive, and paragraphs numbered "17" through "20", both inclusive.

24. That the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus as described above is and has been conduct inconsistent with just and equitable principles of trade.

25. That pursuant to the Securities Exchange Act of 1934, §§6(b), 6(d) and 19(a), 15 U.S.C. §§78f(b), 78f(d) and 18s(a), said defendant New York Stock Exchange is required to adopt and enforce rules prohibiting conduct inconsistent with just and equitable principles of trade and rules insuring fair dealing and the protection of investors.

26. That said Securities Exchange Act of 1934, §19(b), 15 U.S.C. §78s(b), recognizes the jurisdiction of national securities exchanges over odd-lot differentials.

27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff.

28. That as a result of the failure and refusal of said defendant New York Stock Exchange to take action, the differential is and has been greater than it would have been had said defendant New York Stock Exchange exercised its regulatory authority to eliminate and prevent conduct inconsistent with just and equitable principles of trade and to insure fair dealings and the protection of investors.

29. That as a result of such failure and refusal, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have had to pay for

odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

WHEREFORE, plaintiff demands judgment:

A. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to pay treble damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

B. Directing defendant New York Stock Exchange to pay damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

C. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to establish a fund in an amount equal to treble that portion of the differential collected in the past which has been excessive.

D. Enjoining defendants Carlisle & Jacquelin and De-Coppet & Doremus from any further violations of the Sherman Antitrust Act, §§1 and 2, and from collecting any further excessive differentials.

E. Directing defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the amount by which the differential has been excessive in the past.

F. In favor of plaintiff for costs and expenses of this action, including reasonable counsel and accounting fees.

G. For such other and further relief as may be just.

Laventhall & Zicklin
Attorneys for Plaintiff

ANSWER OF DEFENDANT CARLISLE & JACQUELIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Carlisle & Jacquelin, by its attorneys, Carter, Ledyard & Milburn, for its answer to the complaint—

With Respect to the Alleged First Cause of Action

1. Denies the allegations of Paragraph 1, except admits that the first alleged cause of action purportedly arises under the Sherman Antitrust Act, Section 1, 15 U.S.C. §1.

2. Denies the allegations of Paragraph 2, except admits that the jurisdiction of this Court is purportedly based upon the Clayton Antitrust Act, Section 4, 15 U.S.C. §15.

3. Admits the allegations of Paragraph 3.

4. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4, except admits that the ordinary unit of trading in most cases is 100 shares, and that blocks of less than 100 shares are in most cases referred to as "odd-lots."

5. Denies the allegations of Paragraph 5 except admits plaintiff brings this action on behalf of himself and purports to bring this action representatively on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange and admits that such persons are so numerous as to make it impossible to bring them all before the court.

6. Admits the allegations of Paragraph 6.

7. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations of Paragraph 7.

8. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8.

9. Denies the allegations of Paragraph 9.

10. Denies the allegations of Paragraph 10.

11. Denies the allegations of Paragraph 11.

12. Denies the allegations of Paragraph 12.

13. Denies the allegations of Paragraph 13.

14. Denies the allegations of Paragraph 14.

With Respect to the Second Alleged Cause of Action

15. Denies the allegations of Paragraph 15 except admits that the second alleged cause of action purportedly arises under the Sherman Antitrust Act, Section 2, 15 U.S.C. §2.

16. Repeats and realleges its answers to Paragraphs 2 through 14.

17. Denies the allegations of Paragraph 17.

18. Denies the allegations of Paragraph 18.

19. Denies the allegations of Paragraph 19.

20. Denies the allegations of Paragraph 20.

For a First Defense to the First and Second Alleged Causes of Action

21. The matters alleged fail to state a claim upon which relief can be granted.

For a Second Defense to the First and Second Alleged Causes of Action

22. Alleges that the rights of action, if any, as set forth in the first and second alleged causes of action are barred by laches, estoppel, waiver and acquiescence.

For a Third Defense to the First and Second Alleged Causes of Action

23. The first and second alleged causes of action did not accrue within the time limited by 15 U.S.C., §15b.

WHEREFORE, defendant Carlisle & Jacquelin demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Carter, Ledyard & Milburn

By Devereux Milburn
Attorneys for Defendant,
Carlisle & Jacquelin

ANSWER OF DEFENDANT DeCOPPET & DOREMUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant DeCoppet & Doremus, by its attorneys Kelley Drye Newhall Maginnes & Warren, as and for its answer to the complaint, alleges:

FIRST: It denies each and every allegation contained in paragraphs 1 and 2 of the complaint.

SECOND: It denies each and every allegation contained in paragraph 3 of the complaint, except that it admits that at all times mentioned in the complaint defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities listed thereon and for otherwise performing with respect to such securities the functions commonly performed by a stock exchange as that term is generally understood; and it further admits that defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

THIRD: It denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 4 of the complaint.

FOURTH: It denies each and every allegation contained in paragraph 5 of the complaint, except that it admits that all purchasers and sellers of odd-lots on the defendant New York Stock Exchange are so numerous as to make it impossible to bring them all before the Court.

FIFTH: It denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 7 and 8 of the complaint.

SIXTH: It denies each and every allegation contained in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the complaint.

First Defense to the First and Second Causes of Action:

SEVENTH: The first and second causes of action, if any, alleged in the complaint fail to state a claim upon which relief can be granted.

Second Defense to the First and Second Causes of Action:

EIGHTH: Plaintiff and those on whose behalf he purports to bring this action knew of and acquiesced in the procedures and practices by which purchases and sales of stock in odd-lots were made and effected and, accordingly, are estopped and should not be heard now to complain thereof.

Third Defense to the First and Second Causes of Action:

NINTH: Any claim against this defendant based on acts occurring more than four years prior to the commencement of this action is barred by the provisions of Section 4 B of the Clayton Act, 15 U.S.C. §15 b.

WHEREFORE defendant DeCoppet & Doremus demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Kelley Drye Newhall Maginnes & Warren

By: Bud G. Holman
A Member
Attorneys for defendant
DeCoppet & Doremus

ANSWER OF DEFENDANT NEW YORK STOCK EXCHANGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant New York Stock Exchange (hereinafter sometimes called "the Exchange"), by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the complaint:

1. Denies each and every allegation contained in paragraphs 1 and 2, except admits that the first cause of action purportedly arises under, and the jurisdiction of this Court with respect thereto is purportedly based on, the statutory provisions referred to.

2. Denies each and every allegation contained in paragraph 3 except admits that at all times mentioned in the complaint the Exchange was and is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities listed on the Exchange and for otherwise performing with respect to such securities the functions commonly performed by a stock exchange as that term is generally understood; and, further, admits that the Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 4, except admits that the

unit of trading in stocks on the Exchange is, in most cases, 100 shares.

4. Denies each and every allegation contained in paragraph 5, except admits that plaintiff purports to bring the action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange and that such persons are so numerous as to make it impossible to bring them all before the Court.

5. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 7 and 8.

6. Denies each and every allegation contained in paragraphs 9, 10, 11, 12 and 13.

7. Denies each and every allegation contained in paragraph 14, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

8. Denies each and every allegation contained in paragraph 15, except admits that the second cause of action purportedly arises under the statutory provision referred to.

9. Denies each and every allegation contained in paragraphs 17, 18 and 19.

10. Denies each and every allegation contained in paragraph 20, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

11. Denies each and every allegation contained in paragraphs 21 and 22, except admits that the third cause of action purportedly arises under, and the jurisdiction of this Court with respect thereto is purportedly based on, the statutory provisions referred to.

12. Denies each and every allegation contained in paragraph 24.

13. Denies each and every allegation contained in paragraphs 25 and 26, except refers to the statutory provisions referred to therein for the full and complete terms thereof.

14. Denies each and every allegation contained in paragraphs 27 and 28.

15. Denies each and every allegation contained in paragraph 29, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

For a First Defense Alleges:

16. The third alleged cause of action fails to state a claim upon which relief can be granted.

And for a Second Defense Alleges:

17. Any claim against the Exchange under the third alleged cause of action is barred by the Statute of Limitations.

WHEREFORE, defendant New York Stock Exchange demands judgment dismissing the complaint, with costs.

Milbank, Tweed, Hadley & McCloy

By: s/ William E. Jackson
(A Member of the Firm)

AFFIDAVIT OF DEAN WITTER, JR., SWORN TO JUNE 21, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DEAN WITTER, JR., being sworn, says:

I am a general partner in Dean Witter & Co., members of the New York Stock Exchange and other securities exchanges, am in charge of its Eastern Division, and a member of its Executive Committee. The firm consists of more than seventy general partners and approximately forty limited partners. It is divided into four Divisions: the Pacific Northern Division (headquarters in San Francisco and branches in California, Honolulu, Oregon, Utah and Washington), the Pacific Southern Division (headquarters in Los Angeles and branches in California and Arizona), the Eastern Division (headquarters in New York and branches in Boston and Philadelphia) and the Midwest Division (headquarters in Chicago and branches in Iowa, Indiana, Missouri, Illinois and Nebraska). We have over fifty offices throughout the United States and Hawaii. Each month the firm sends out approximately 70-80,000 customers statements to customers throughout the United States. We also do a considerable volume of business with banks and institutions in Europe, representing many individual investors there. In addition, we do a large business with institutions in Canada.

Odd-lot transactions may be executed for an overwhelmingly large proportion of our customers, at one time or

another. While institutions and large investors transactions are predominantly in round-lots (i.e., 100-share units), almost any account can require odd-lot transactions as a result of stock splits, dividends, etc., which put odd lots of stock into their accounts. For example, each customer who, three months ago held 100 shares of IBM stock, now has 150 shares, a round-lot and an odd-lot. In order to bring their holdings to an even multiple of 100, many of them will either buy or sell 50 shares on the odd-lot market.

Thus there is no ready way to separate odd-lot customers from round-lot customers. To determine which customers had odd-lot transactions recently would require sorting of some (approximately) 3,400,000 names of customers, which would include defunct accounts, persons who have moved from their previous address, persons who had odd-lot transactions only in certain months, customers who may have only executed a single transaction through us, and the like. Under present conditions we are executing over 1200 odd-lot transactions on the New York Stock Exchange daily.

Our customers themselves are of many types. As well as for individual trading for their own accounts, we act as brokers for banks, fiduciaries, investment funds, mutual funds, trust funds, investment counsellors (acting under powers of attorney), business corporations, insurance companies, pension funds, trusts, investment clubs, and many others. The investment aims, degrees of market sophistication and knowledge, frequency of transactions, types of securities negotiated, and prices at which the transactions are executed (whether above or below the odd-lot differential) take almost as many different forms as there are different customers.

Probably the bulk (median) of the business comes from individuals earning approximately $15,000 per year, and these accounts are very apt to be buying odd-lots, partic-

ularly if they are saving or building an investment program out of income. Odd-lot buyers may purchase new issues as well as market issues; and they may buy as traders looking to rapid turnover of securities with a relatively higher degree of speculation (and a predominant interest in price fluctuation), or as investors (looking to the long-term trend of stock values over the years rather than the mechanical costs of purchase or sale). The in-and-out trader must weigh the cost of commissions, odd-lot differential and taxes more carefully than an investor, upon whom the effect of these less frequently incurred costs is hardly noticed.

Thus different classes of customers have interests which are affected differently (and in some cases, only negligibly) by the odd-lot differential. Those engaged in arbitrage—as in the case of those who buy the stock of one of two companies about to merge while selling the stock of the other company short—stand on a different footing from other odd-lot customers. If their short sales are made in the odd-lot market, it is for the purpose of obtaining ready buyers (the odd-lot dealers) on sales triggered by round-lot purchases. These are artificial transactions designed for arbitrage, and quite different from other customers.

The types of orders entered for odd-lots also vary across a wide range. The order may be entered as agent or as principal; it may be long or short; it may require immediate execution at the market price; it may be a "limit" order (i.e., at a prescribed price); it may be a "day" order (which expires if not filled on the day entered) or may be good for a week, or good until cancelled (an "open" order); it may be a "stop loss" order, which becomes a market order when a specified price is reached; or it may require a purchase or sale upon the closing bid or offer (which is used where volume in the stock is negligible

and a sale or purchase imperative). It is apparent that various of these types of orders require more attention to be devoted to them by the broker and by the odd-lot dealer than others do. A short sale requires more policing to be sure that it complies with New York Stock Exchange rules and with the securities laws. An order good till cancelled, or good for a specified time, is held open upon the books of the dealer and must be watched. The more complicated and sophisticated orders thus demand a great deal more handling, are much more expensive to execute, and increase the possibilities of error over the simpler forms of order. Thus considerably more or less service may be required for various types of orders, although the same commission and the same odd-lot differential is charged for each.

With respect to limit orders, in the majority of cases the customer sustains no impact whatever of the odd-lot differential. The limit order directs that the stock be sold (or bought) to yield a specified price (or cost) to the customer. If the order is to sell at 20, for example, the transaction will be executed at 20⅛. While the odd-lot dealer obtains a trading advantage of ⅛ of a point, the customer receives the 20 price he stipulated.

A customer who has a margin account or who deposits his securities with our firm has little interest in prompt delivery following execution of his transaction, while a customer who holds his securities himself (and may require them for use in another transaction) has a high interest in prompt delivery. Promptness of delivery is supplied by the odd-lot dealers at considerable cost to them, including the borrowing of stock where necessary to effect it.

Despite the large number and variety of odd-lot customers transactions which we have handled over the years, I am aware of no specific complaint made by a customer regarding the amount of the odd-lot differential. For the

reasons stated above, it is most unlikely that there could be any unanimity in the nature of any complaint, for the impact of the differential differs so widely between different types of customers and different types of orders.

Dean Witter, Jr.

(Sworn to June 21, 1966.)

AFFIDAVIT OF BAYARD DOMINICK SWORN TO JUNE 23, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

BAYARD DOMINICK, being sworn, says:

I am an Executive Vice President of Dominick & Dominick, Incorporated, members of the New York Stock Exchange and of the American, Midwest, Pacific and Toronto Stock Exchanges. Our head office is at 14 Wall Street, New York City; we have branch offices not only in New York City but also in Buffalo, Chicago, Los Angeles, Portland, San Francisco and Seattle. We will soon open a branch office in Houston, and our affiliate Dominick Corporation of Canada (with offices in Montreal and Toronto) will soon open an office in Vancouver. Dominick & Dominick, Ltd. in London, England is another affiliate, as well as Dominick & Dominick, Underwriting Ltd. and we have a transmittal office in Basle, Switzerland.

Our active customers number about 7,000, and we have another approximately 13,000 occasional customers. Ours is one of the biggest correspondent firms on the New York Stock Exchange (a "correspondent firm" executes and clears transactions for out-of-town member firms). As an approximation, I would estimate that perhaps 60% of the volume of shares bought and sold by Dominick & Dominick Incorporated as brokers on the New York Stock Exchange is executed on behalf of our out-of-town correspondents.

The proportion of odd-lot transactions executed for correspondents is probably higher, than is done by Dominick & Dominick. During the week (five trading days) of June 6-10, 1966, our office records show that we executed 1,608 odd-lot transactions. The number of Dominick & Dominick customers having odd-lot transactions in that week was 381. Transactions executed on behalf of correspondents numbered 1,227. The total volume of odd-lot shares bought and sold through our firm in that week was 43,809 shares. We acted on behalf of 14 correspondents, all of whom are located out of town, and 13 of whom are located in other states. We cannot identify the individual customers for whom the correspondents execute orders through Dominick & Dominick. Dominick & Dominick's customers extend throughout the United States and many other parts of the world.

Probably every customer has, at one time or another, some odd lots of stock in his portfolio as a result of stock splits and stock dividends, and thus may engage in odd-lot transactions to round out his holding, if for no other purpose. As a matter of fact, more and more people holding investment accounts acquire and sell odd lots of stock, for they tend to invest in even units of dollars rather than in even units of stock.

The majority of our clients are investors; we have very few speculative accounts. Our customers include among others individual corporations, pension funds, mutual funds, closed-end investment funds, banks (domestic and European), and every category of individual (mostly in high-grade investment accounts of $100,000 or more). Our individual customers include presidents and executives of corporations, professionals such as lawyers and doctors, retired business men, shop owners, individual bankers, foreigners and United States nationals, children (through trusts), estates, and many others.

I have practically never heard a complaint respecting the odd-lot differential. Most of Dominick & Dominick's customers simply do not care about the differential. It does not make much difference from an investment point of view whether the price of the stock is above or below the break-point. An active trader (as opposed to an investor) is affected by the odd-lot differential, for he is working for every eighth and quarter-point, usually on margin to the greatest extent possible, so every cost of interest, commission, taxes and differential does affect him. That is not true of the purchaser who buys for investment, for the costs of executing any particular investment are small in relation to the money involved, and his interest lies in capital gains and dividends.

The prompt deliveries of stock which we receive from the odd-lot dealers is an important matter to those of our customers who require delivery of their stocks to them (the majority of our accounts leave it on deposit with us and we hold, as a rough guess, over $750,000,000 of customers' securities). Our "Failures to Receive and Deliver" approximate $20,000,000. If a customer wants his stock it must be delivered to him; these customers get the benefit of the prompt service of the odd-lot dealer.

There is no question that stop-loss orders, short sales, and limited orders (such as "good till cancelled") take more time to handle than straight market orders. We have to set up safeguards to see that they are properly handled, and so must the odd-lot dealers. Regardless of the type of order, the odd-lot differential remains the same.

BAYARD DOMINICK

(Sworn to June 23, 1966.)

AFFIDAVIT OF JOSEPH F. NEIL, JR., SWORN TO JULY 1, 1966

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOSEPH F. NEIL, JR., being duly sworn, deposes and says:

1. I am a Partner of Goodbody & Co. (hereinafter together with any predecessor firms sometimes called "my Firm"), have been associated with my Firm or its predecessors for upwards of twelve (12) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is a member organization of New York Stock Exchange and has been, and still is engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange. Our main office is located at 2 Broadway, New York, New York and we have eighty-three (83) branch offices located in all parts of the continental United States.

3. My Firm has in excess of One Hundred Fifty Thousand (150,000) customers located throughout the United States, and in many foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal holding companies, and non-

bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares or multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers Eight Hundred Sixty-nine Thousand Four Hundred Eighty-three (869,483) separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm's customers engage in many types of odd-lot transactions. Thus, my Firm has handled Market Orders (orders to buy or sell at the market), Limited Orders and Stop Loss Orders (orders to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day in which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer-

Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Many of our customers purchase stocks through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately One Thousand Four Hundred Thirty (1,430) active issues, as well as the approximately Two Hundred Ten (210) inactive issues listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks selling for as little as two dollars a share and as high as several hundred dollars a share.

JOSEPH F. NEIL, JR.

(Sworn to July 1, 1966.)

AFFIDAVIT OF EDWARD I. O'BRIEN SWORN TO JULY 1, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

EDWARD I. O'BRIEN, being duly sworn, deposes and says:

1. I am a Vice President of Bache & Co. Incorporated (hereinafter together with any predecessor firms sometimes called "my Firm"), have been associated with my Firm or its predecessors for upwards of ten (10) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange.

3. My Firm has in excess of 100,000 customers located throughout the United States, and in many foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal

holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares of multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers 1,429,845 separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those individuals of modest means to multi-million dollar corporations.

5. My Firm's customers engage in many types of odd-lot transactions. Thus, my Firm, has handled Market Orders (order to buy or sell at the market), Limited Orders and Stop Loss Orders (order to buy or sell at a prescribed price), Day Orders (order which remains in force only through the day in which it was entered), Open Orders (order kept in force beyond the day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit) Order to Buy on Offer

—Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (order to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (order to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Many of our customers purchase stocks through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately 1430 active issues as well as the approximately 210 inactive issues listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks selling for as little as two dollars a share and as high as several hundred dollars a share.

EDWARD I. O'BRIEN

(Sworn to July 1, 1966.)

AFFIDAVIT OF WILLIAM D. FLEMING SWORN TO JUNE 30, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM D. FLEMING, being duly sworn, deposes and says:

1. I am the President of Walston & Co., Inc. a Delaware Corporation (hereinafter together with any predecessor firms sometimes called "my Firm"), havee beene associated with my Firm or its predecessors for upwards of twenty (20) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been, and still is, a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its cusotmers shares of stock of corporations whose stock is listed on the New York Stock Exchange. While my Firm's main office is in New York City, we have ninety other offices. These are scattered throughout the continental United States, with thirty-two on the West Coast, twenty-five on the East Coast, seventeen in the Midwest and thirteen in Florida. In addition we have two offices in Hawaii and one in Switzerland.

3. My Firm has in excess of Three Hundred Thousand (300,000) customers located throughout the United States, and in many foreign countries. Of these about One Hun-

dred Thousand (100,000) are active customers while the rest have only occasional transactions. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange, which, except with respect to certain inactive stocks, is one hundred shares or multiples thereof ("round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arrangd for its customers Eight Hundred One Thousand Eight Hundred Eighty-Five (801,885) separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm handled for our customers many different types of odd-lot transactions. Among these were Market Orders (order to buy or sell at the market), Limited Orders

and Stop Loss Orders (order to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day in which they were entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (GTC) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer —Sell on Bid (orders that do not require a triggering round-lot transaction), orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Some of our customers trade for cash and some on margin. Many of our customers purchase stocks through the Monthly Investment Plan. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stock in which my Firm's odd-lot customers deal embrace nearly all of the approximately One Thousand Four Hundred Thirty (1,430) active issues as well as many of the approximately Two Hundred Ten (210) inactive stocks listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stock selling for as little as two dollars a share and as high as several hundred dollars a share.

William D. Fleming

(Sworn to June 30, 1966.)

AFFIDAVIT OF MATTHEW J. SMITH SWORN TO JUNE 30, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MATTHEW J. SMITH, being duly sworn, deposes and says:

1. I am a vice-president of Merrill Lynch, Pierce, Fenner & Smith Incorporated (hereinafter together with any predecessor firms sometimes called "my Firm"), and Director of its Administrative Division, and I have been associated with my Firm or its predecessors for upwards of 17 years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been, and still is, a member of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks ar listed on the New York Stock Exchange.

3. My Firm has in excess of 700,000 customers located throughout the United States, and in many foreign countries, serviced by 145 offices in the United States and Canada, and 13 offices throughout the rest of the world. These customers include such diverse entities as individuals, institutions, including savings banks, educational institutions, foundations, religious groups, fraternal and other non-profit organizations, life and other insurance companies, labor unions, investment clubs, credit unions, mutual funds and

closed-end investment companies, non-financial corporations, business corporations, partnerships, trustees in bankruptcy, personal holding companies, estates, guardianships, pension funds, employee stock purchase plans, personal trusts, conservatorships, custodians and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange, i.e., one hundred shares or multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). For the past several years my Firm has handled approximately 20% of the odd-lot business on the New York Stock Exchange. Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's activities for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from January 1, 1962 through December 31, 1965, my Firm arranged for its customers approximately 5,500,000 separate odd-lot purchases or sales (not including transactions in Monthly Investment Plan (hereafter "MIP") accounts). The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes. My Firm handled Market Orders (orders to buy or sell at them arket), Limited Orders and Stop Loss Orders (orders to buy or sell at a pre-

scribed price), Day Orders (orders which remain in force only through the day in which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer—Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot offer or bid), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Some of our customers trade for cash and some on margin.

6. Some of our odd-lot customers are individual investors with limited funds who purchase only odd lots of their favorite stocks. Some customers purchase odd lots as they enter the market for the first time, and then purchase round lots as they gain experience and confidence. Other customers who may generally buy and sell round lots may find it necessary on occasion to buy and sell odd lots. Thus, for example, the holder of Standard Oil of Indiana who receives a stock dividend in the form of shares of Standard Oil of New Jersey may sell the Standard Oil of New Jersey stock because he doesn't want to bother holding odd lots. Or the executor of an estate who must raise funds to pay debts, taxes or legacies may sell odd lots to raise only so

much cash as he actually needs, and thereby preserve the balance of the stock holdings for distribution to the legatees. Along the same lines, an executor may buy or sell odd lots in order to have holdings available for equal distribution among the legatees (e.g., an executor with 100 shares of XYZ stock to distribute to 3 legatees might either buy 2 shares or sell 1 share so that each legatee receives the same number of shares).

My Firm has more than half of the approximately 180,000 New York Stock Exchange MIP accounts. By their nature these accounts involve odd lot transactions. Many of our MIP customers also have regular accounts with us, in which some of them often buy and sell in round lots.

A booklet recently published by the New York Stock Exchange, entitled "New Investors", indicates that the number of minor shareholders has increased from 450,000 in 1962 to 1,280,000 in 1965 (page 6). Many of these minors have acquired their holdings through the various Gifts to Minors statutes, whose use is becoming increasingly popular. Many gifts under the Gifts to Minors acts are small gifts of a few shares to commemorate a birth, baptismal, graduation, confirmation or similar event. It is not likely that the persons making these gifts are concerned with the odd lot differential.

MATTHEW J. SMITH

(Sworn to June 30, 1966.)

AFFIDAVIT OF EDWIN B. PETERSON SWORN TO JULY 1, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

EDWIN B. PETERSON, being sworn, says:

I am a general partner in Francis I. duPont & Co., members of the New York Stock Exchange and other securities exchanges. The firm consists of thirty-eight general partners and approximately fifteen limited partners. Although there are partners in charge of various offices throughout the country, the firm is centrally controlled from the main office at No. One Wall Street, New York City. Our firm maintains 104 offices, included in which are offices in London, Amsterdam, Frankfurt, Lausanne, Beirut, and two in Canada.

I caused a check of our records to be made for the period from January 1, 1966 through May 31, 1966 and found that we mailed statements to an average of 141,307 customers each month. This number does not represent anything like our entire clientele but merely those customers for whom the firm is carrying a position at the time of the mailing—in other words, "open accounts". The total number of the firm's clients would be vastly in excess of this mailing list; I would estimate somewhere between 500,000 and 1,000,000.

For various reasons, including the prevalence of stock splits, stock dividends, etc., a great majority of our cus-

tomers are involved in odd-lot transactions, but there is no way of obtaining exact information in this connection without analyzing the history of each account for the period of time involved. In view of the enormous numbers, this task would be virtually impossible.

During the five months covered by my investigation, the firm averaged 1,932 odd-lot transactions per day on the New York Stock Exchange alone. Almost every conceivable type of customer was involved, as for instance, individuals, banks, fiduciaries (including executors and trustees), custodians under the Gifts to Minors Act, mutual funds, trust funds, investment counsellors (acting under powers of attorney), business partnerships, business corporations, insurance companies, pension funds, trusts, investment clubs, and many others too numerous to list.

There are many different types of orders involved in odd-lot transactions, as for instance, market order, limit order, day order, good for a week, good until cancelled, open door, stop loss order, basis order, money order, etc., etc. My firm handles all of them at one time or another, and each different type of order requires a different type of handling. A money order, for example, involves a customer who calls up and states that he has a definite amount of money and would like to buy as many shares as possible of a certain stock. My firm must ascertain the price of the stock, the brokerage commission, compute the probable differential, and arrange for the disposition of the excess of the money available over the cost of the order.

It is absolutely essential that the odd-lot houses provide for the prompt delivery of stock. A small investor wants to receive his securities as soon as he has put up his money and our firm is equally desirous that he should receive them at once. We feel that it is a good policy for a small investor to receive all the literature, such as proxy statements and

annual statements, which goes out periodically to stockholders and, in addition, it saves the firm the trouble and expense of holding and servicing an inordinate number of small accounts.

The odd-lot differential is accepted by the investor without comment. I do not remember any specific complaints on this subject.

EDWIN B. PETERSON

(Sworn to July 1, 1966.)

AFFIDAVIT OF DANIEL T. BERGIN SWORN TO JULY 6, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DANIEL T. BERGIN, being duly sworn, deposes and says:

1. I am a General Partner of Hornblower & Weeks-Hemphill, Noyes (hereinafter together with any predecessor firms sometimes called "my Firm"), having been associated wtih my Firm for upwards of 40 years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is, a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange.

3. My Firm has in excess of 100,000 customers, located throughout the United States and in some foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, businesss corporations, partnerships, personal holding companies, and non-bank-administered estates, guardian-

ships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares (a "round-lot" transaction) or multiples thereof or in units of less than the standard unit of trading, namely, one to ninety-nine shares (an "odd-lot" transaction). Many of our customers give my Firm orders to buy or sell both round-lots and odd-lots of stock. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four-year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers in excess of 600,000 separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm has handled for customers many different types of odd-lot transactions. Among these were Market Orders (orders to buy or sell at the market), Limited Orders and Stop Loss Orders (orders to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day on which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limit Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer —Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close

(orders to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Some of our customers purchase stock through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately 1430 active issues, and the approximately 210 inactive issues, listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks sell for as little as two dollars a share and as high as several hundred dollars a share.

DANIEL T. BERGIN

(Sworn to July 6, 1966.).

PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES, VERIFIED ON JUNE 28, 1966

(Record pp. 53-63)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Answers of plaintiff Morton Eisen to interrogatories served upon him by defendants on June 17, 1966.

1: My residence address is 15-86 Bell Boulevard, Bayside, Queens, New York.

2: I am a wholesale shoe sales representative. My business address is 130 West Broadway, New York, New York.

3: The following are the transactions, numbered (i) through (xlvii), in which I engaged during the six years next preceding the filing of the complaint in this action, involving the purchase or sale of an odd-lot of stock on the New York Stock Exchange and the information requested in "(a)" through "(k)" of Interrogatory "3" for each such transaction:

(i) (a)
Raytheon Mfg.

(b)
purchase

(c)
47⅛

(d)
50 shares

(e)

May 19, 1960

(f)

$28.56

(g)

$12.50

(h)

To the best of my recollection, with respect to this and all of my other odd-lot transactions, listed below, each such transaction was long and the order under which each was effected (54) was either market or limit, which, in turn, was either a day order, open order or good until cancelled order. However, with respect to each such transaction, I cannot recall whether it was market or limit or any further particulars as to the type of order under which it was effected. Therefore, the foregoing is my answer to interrogatory "3(h)" for all of my transactions listed herein.

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

own account.

(ii) (a)

Universal Cyclops Steel

(b)

purchase

(c)

31⅞

(d)

5 shares

(e)

October 3, 1960

(f)

$6.00

(g)

.625 cents

(i)

Ira Haupt & Co.

(j)

Defendant DeCoppet & Doremus

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein, whose address is 2785 Broadway, New York. Michael L. Rubinstein is my stepson.

(iii) (a)

Diners Club

(b)

purchase

(c)

18⅝

(d)

10 shares

(e)

October 3, 1960

(f)

$6.00

(g)

$1.25

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

account of Morton Eisen, Custodian for Michael L. Rubinstein.

(iv) (a)

Pure Oil Co.

(b)

purchase

(c)

32⅝

(d)

5 shares

(e)

October 3, 1960

(f)

$6.00

(g)

.625 cents

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

account of Morton Eisen, Custodian for Michael L. Rubinstein.

(v) (a)

American Motors Corp.

(b)

sale

(c)

20½

(d)

65 shares

(e)

April 5, 1961

(f)

$18.33

(g)

$8.125

(i)

Cohen, Simonson & Co.

(55) (j)

To my best knowledge, with respect to all odd-lot business, Cohen, Simonson & Co., at the time of this transaction and to this date, dealt and now deals with defendant DeCoppet & Doremus exclusively for six months of each year and with defendant Carlisle & Jacquelin exclusively for the other six monthss of each year (not necessarily consecutive calendar months). However, I do not know which of said two defendants effected this particular transaction.

(k)

own account.

(vi) (a)

International Telephone & Telegraph

(b)
sale

(c)
58

(d)
50 shares

(e)
April 19, 1961

(f)
$31.50

(g)
$12.50

(i)
Cohen, Simonson & Co.

(j)
My answer is the same as in (v) (j), above

(k)
own account

(vii) (a)
Olin Mathieson Chemical

(b)
sale

(c)
43

(d)
50 shares

(e)
April 27, 1961

(f)

$26.50

(g)

$12.50

(i)

Edwards & Hanly was my broker for this and all of my transactions listed in (viii) through (xlvii), below.

(j)

The only information which I have with respect to this interrogatory, is that I have been advised by the account executive in charge of my accounts at Edwards & Hanly that at the time of this transaction and to this date, with respect to all odd-lot business, Edwards & Hanly dealt and now deals with defendant Carlisle & Jacquelin, exclusively. Therefore, the foregoing is my answer to Interrogatory "3(j)" for this and all of my transactions listed in (viii) through (xlvii), below.

(k)

own account.

(viii) (a)

Raytheon Company

(b)

Sale

(c)

37⅛

(d)

51 shares

(e)

April 27, 1961

(f)
$23.93

(g)
$6.375

(k)
own account

(ix) (a)
Standard Kollsman

(b)
sale

(c)
50⅛

(d)
3 shares

(e)
June 2, 1961

(f)
$6.00

(g)
75 cents

(k)
own account

(56) (x) (a)
Standard Oil Co. (Ohio)

(b)
sale

(c)
53⅝

(d)

2 shares

(e)

October 24, 1961

(f)

$6.00

(g)

50 cents

(k)

Account of Morton Eisen, Custodian for Mark J. Eisen, whose address is 15-16 Bell Boulevard, Bayside, Queens, New York. Mark J. Eisen is my son.

(xi) (a)

Standard Oil Co. (Ohio)

(b)

sale

(c)

53⅝

(d)

2 shares

(e)

October 24, 1961

(f)

$6.00

(g)

50 cents

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xii) (a)

Standard Oil Co. (Ohio)

(b)

sale

(c)

53⅝

(d)

2 shares

(e)

October 24, 1961

(f)

$6.00

(g)

50 cents

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen, whose address is 15-86 Bell Boulevard, Bayside, Queens, New York. Eric A. Eisen is my son.

(xiii) (a)

American Viscose

(b)

sale

(c)

56⅝

(d)

50 shares

(e)

November 17, 1961

(f)

$31.16

(g)
$12.50

(k)
own account

(xiv) (a)
American Viscose

(b)
sale

(c)
54½

(d)
15 shares

(e)
December 6, 1961

(f)
$13.18

(g)
$3.75

(k)
own account

(xv) (a)
Avco Corporation

(b)
purchase

(c)
21

(d)
5 shares

(e)

June 28, 1962

(f)

$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

(57) (xvi) (a)

American Viscose

(b)

sale

(c)

60⅞

(d)

35 shares

(e)

December 31, 1962

(f)

$26.31

(g)

$8.75

(k)

own account

(xvii) (a)

Control Data

(b)

purchase

(c)

44⅝

(d)

5 shares

(e)

April 29, 1963

(f)

$6.00

(g)

$1.25

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

(xviii) (a)

Avco Corporation

(b)

sale

(c)

26⅜

(d)

5 shares

(e)

April 29, 1963

(f)

$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

(xix) (a)
Magnavox Co.

(b)
sale

(c)
41⅝

(d)
45 shares

(e)
April 29, 1963

(f)
$23.73

(g)
$11.25

(k)
oun account.

(xx) (a)
Control Data

(b)
purchase

(c)
45

(d)
8 shares

(e)
April 30, 1963

(f)
$8.20

(g)

$2.00

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxi) (a)

Pure Oil Co.

(b)

sale

(c)

40¼

(d)

5 shares

(e)

April 30, 1963

(f)

$6.00

(g)

$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(58) (xxii) (a)

Universal Cyclops Steel

(b)

sale

(c)

30⅛

(d)

5 shares

(e)

April 30, 1963

(f)

$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxiii) (a)

Magnavox Co.

(b)

sale

(c)

41⅜

(d)

55 shares

(e)

May 6, 1963

(f)

$27.76

(g)

$13.75

(k)

own account.

(xxiv) (a)

Metro-Goldwyn Mayer

(b)
purchase
(c)
33½
(d)
15 shares
(e)
June 21, 1963
(f)
$10.03
(g)
$1.875
(k)
own account.
(xxv) (a)
Raytheon Co.
(b)
sale
(c)
21⅜
(d)
1 share
(e)
July 24, 1963
(f)
$1.28
(g)
$.125
(k)
own account.

(xxvi) (a)
International Rectifier

(b)
sale

(c)
8¾

(d)
50 shares

(e)
July 25, 1963

(f)
$9.38

(g)
$6.25

(k)
own account.

(xxvii) (a)
International Rectifier

(b)
sale

(c)
8⅜

(d)
50 shares

(e)
August 15, 1963

(f)
$9.19

(g)
$6.25

(k)

own account.

(59) (xxviii) (a)

Diners Club

(b)

sale

(c)

22¾

(d)

10 shares

(e)

October 24, 1963

(f)

$6.00

(g)

$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxix) (a)

Avco Corporation

(b)

purchase

(c)

23½

(d)

10 shares

(e)

October 24, 1963

(f)

$6.00

(g)

$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxx) (a)

Greyhound Corp.

(b)

purchase

(c)

47¼

(d)

20 shares

(e)

November 22, 1963

(f)

$14.45

(g)

$5.00

(k)

own account.

(xxxi) (a)

Greyhound Corp.

(b)

sale

(c)

46

(d)

20 shares

(e)

November 22, 1963

(f)

$14.20

(g)

$5.00

(k)

own account.

(xxxii) (a)

Control Data

(b)

sale

(c)

97¾

(d)

5 shares

(e)

November 26, 1963

(f)

$7.50

(g)

$1.25

(k)

Account of Morton Eisen, Custodian for Mark J. Eisen.

(xxxiii) (a)

Control Data

(b)

sale

(c)

97¾

(d)

15 shares

(e)

November 26, 1963

(f)

$19.66

(g)

$3.75

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

(60) (xxxiv) (a)

Control Data

(b)

sale

(c)

97¾

(d)

10 shares

(e)

November 26, 1963

(f)

$14.78

(g)

$2.50

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxxv) (a)

Greyhound Corp.

(b)

purchase

(c)

46⅞ for 20 shares, 46⅝ for 100 shares

(d)

120 shares

(e)

December 5, 1963

(f)

$14.38 for 20 shares, $42.31 for 100 shares

(g)

$5.00

(k)

own account.

(xxxvi) (a)

Control Data

(b)

purchase

(c)

101¼

(d)

70 shares

(e)

January 3, 1964

(f)
$44.09

(g)
$17.50

(k)
own account.

(xxxvii) (a)
Control Data

(b)
sale

(c)
86¾

(d)
70 shares

(e)
January 28, 1964

(f)
$43.07

(g)
$17.50

(k)
own account.

(xxxviii) (a)
Greyhound Corp.

(b)
purchase

(c)
55⅛

(d)
30 shares

(e)

February 27, 1964

(f)

$21.54

(g)

$7.50

(k)

own account.

(xxxix) (a)

Greyhound Corp. with due bill

(b)

sale

(c)

55⅛ for 50 shares, 55⅜ for 100 shares

(d)

150 shares

(e)

June 18, 1964

(f)

$30.78 for 50 shares, $44.54 for 100 shares

(g)

$12.50

(k)

own account.

(61) (xl) (a)

Chrysler Corp.

(b)

purchase

(c)
50¼ for 50 shares, 50 for 100 shares

(d)
150 shares

(e)
June 18, 1964

(f)
$29.56 for 50 shares, $44.00 for 100 shares

(g)
$12.50

(k)
own account.

(xli) (a)
Chrysler Corp.

(b)
purchase

(c)
50

(d)
10 shares

(e)
June 18, 1964

(f)
$10.00

(g)
$2.50

(k)
own account.

(xlii) (a)
Chrysler Corp.

(b)

sale

(c)

66¼ for 60 shares, 66½ for 100 shares

(d)

160 shares

(e)

September 15, 1964

(f)

$36.88 for 60 shares, $45.65 for 100 shares

(g)

$15.00

(k)

own account.

(xliii) (a)

Spiegel Inc.

(b)

sale

(c)

38⅝

(d)

45 shares

(e)

August 2, 1965

(f)

$22.38

(g)

$5.625

(k)
own account.

(xliv) (a)
Spiegel Inc.

(b)
sale

(c)
39⅜

(d)
55 shares

(e)
August 25, 1965

(f)
$26.66

(g)
$6.875

(k)
own account.

(xlv) (a)
Wolverine Shoe

(b)
purchase

(c)
30⅛

(d)
5 shares

(e)
October 21, 1965

(f)
$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Mark J. Eisen.

(xlvi) (a)

Douglas Aircraft

(b)

sale

(c)

64⅞

(d)

8 shares

(e)

November 10, 1965

(f)

$10.19

(g)

$2.00

(k)

own account.

(62) (xlvii) (a)

Morse Shoe, Inc.

(b)

sale

(c)

24⅛

(d)

50 shares

(e)

February 3, 1966

(f)

$17.06

(g)

$6.25

(k)

own account.

4: Except for communications with my attorneys, the only communications relating to the subject-matter of this action which I have at any time during the six years next preceding the filing of the complaint in this action had with others was oral and, to the best of my knowledge and recollection, consisted of my general complaint concerning the injustice of the existing odd-lot differential. I have no recollection as to the identity of the persons to whom I directed such comments nor do I know whether any such persons were purchasers or sellers of odd-lots on the New York Stock Exchange.

5: Except for communications with my attorneys, the only communicationss relating to the subject-matter of this action which I have at any time since the commencement of this action had with others consisted of oral comments of congratulations and good wishes for the successful prosecution of this action from friends and acquaintances and certain persons who called me on the telephone. I have no knowledge as to whether such friends and acquaintances of mine are or ever were purchasers or sellers of odd-lots on the New York Stock Exchange nor do I know the names or have any other information concerning the said persons who called me on the telephone.

(Verified by plaintiff, June 28, 1966.)

OPINION BY TYLER, J., DATED SEPTEMBER 27, 1966, GRANTING DEFENDANTS' MOTION TO EXTENT THAT ACTION, AS CLASS ACTION, IS DISMISSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This is an action brought by a New York resident, Morton Eisen, charging the two major "odd-lot" dealers on the New York Stock Exchange—defendantss Carlisle & Jacquelin and DeCoppet & Doremus—with conspiring and combining to monopolize odd-lot trading and with charging excessive fees in violation of the Sherman Act. 15 U.S.C. 1 and 2. The complaint also pleads a third claim or cause of action against the New York Stock Exchange ("Exchange") upon the theory that the Exchange breached its duties prescribed by the Securities Exchange Act of 1934 for suspension of odd-lot trading. 15 U.S.C. 78f(b), 78f(d) and 78s(a). Eisen, who describes himself as an investor, asserts that he sues for himself and on behalf of all odd-lot purchasers and sellers on the Exchange.

The taproot of Eisen's three claims is the so called "odd-lot differential" charged by the broker defendants and other odd-lot dealers for transactions in other than 100 share lots of securities. As is well known, the normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "round-lots." Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the "odd-lot

differential" is charged. At the time this suit was commenced, the differential was ⅛ point (12½ cents) per share when the price per share was 39⅞ or below and ¼ point (25 cents) when the price was 40 or above. Effective July 1, 1966, however, this "break point" of $40 was increased to $55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid. It is Eisen's theory in this case that the two broker-dealer defendants, with the benign indulgence of the Exchange, have "established, increased and maintained" the differential.

The defendants have moved pursuant to amended Rule 23(c)(1), F.R.Civ.P., effective July 1, 1966, seeking to obtain an adjudication that the present action is not maintainable as a class action. Plaintiff, of course, relies on new Rule 23 to support his suit as a class action.

Amended Rule 23(a) sets forth four specific prerequisites to a class action:

(1) The class "is so numerous that joinder of all members would be impracticable";

(2) questions of law or fact common to the class exist;

(3) claims or defenses of the representative parties are typical of those of the class; and

(4) the representative parties will adequately protect the interests of the class.

Amended Rule 23(b) specifically states that for a suit to be maintained as a class action, the specific prerequisites just listed must be satisfied and, in addition, at least one of three following requirements or conditions must be shown:

1. Prosecution of separate actions by or against separate members of the class would create a risk of inconsistent or varying adjudications, or adjudications which would practically dispose of or impair the interests of class members not parties thereto;

2. the party opposing the class has acted or failed to act, thereby rendering appropriate injunctive or declaratory relief respecting the entire class; or

3. the court finds that questions of law or fact common to the class predominate over such questions affecting only individual members and, in addition, that the class action is superior to other available methods or procedures for fair and efficient adjudication of the controversy. See *Notes of Advisory Committee on Amendments to Rules of Civil Procedure* (hereinafter "Advisory Com. Notes"), 39 F.R.D. 98-100.

As will be suggested by the discussion hereinafter, plaintiff's suit could only fit in theory the last-mentioned category or requirement set forth in amended Rule 23(b)—i.e. that plaintiff's suit, if to be maintained as a class action, must be shown to present questions of fact or law common to the class which predominate over such questions effecting only individual members. Suffice it to say here that, despite belated unconvincing suggestions to the contrary in their reply brief, plaintiff's counsel originally intended and argued that their client's suit meets this requirement. Thus, plaintiff in effect attempts to show that his action is what was characterized under former Rule 23 as a spurious class action, and it may be at least generally helpful to consider some of the judge-made requirements and prerequisites for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule. See discussion at 39 F.R.D. 98-103.

The spurious class action under the former Rule was considered merely a permissive joinder device, and prior to the July 1, 1966 amendment, the judgment in such cases bound only the original parties of record and those who intervened and became parties to the action. See *Lipsett* v. *United States*, 359 F.2d 956, 959 (2d Cir. 1966); *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247 (2d Cir. 1954); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Schatte* v. *International Alliance of Theatrical Stage Employees, etc.*, 183 F.2d 685 (9th Cir. 1950); *California Apparel Creators* v. *Wieder of California*, 162 F.2d 893 (2d Cir. 1947); *Cutler* v. *American Federation of Musicians, etc.*, 211 F. Supp. 433 (S.D.N.Y. 1962). The principal requirements for its use were that the character of the right sought to be enforced for or against the class be several, that there be a common question of law or fact affecting the several rights and that common relief be prayed for. Nevertheless, as I read the above cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated prerequisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23, even though they were not all spelled out therein. The prerequisite, for example, that the plaintiff bringing the action must be one who will fairly protect the interests of the class was one which, though recognized, did not always cause the courts undue concern, largely because only the original plaintiff and intervenors were bound by the judgment. The Court of Appeals for this Circuit, for example, having long recognized that a spurious class suit under former Rule 23 in reality was no more than a permissive joinder device, stated years ago that, in such suits, "there is no need for a searching inquiry concerning the adequacy of [plaintiff's] representation of others in the class."

York v. *Guaranty Trust Co. of New York*, 143 F.2d 503 (2d Cir. 1944), *reversed on other grounds*, 326 U.S. 99 (1945). Notwithstanding that comparatively extreme statement, the courts in this circuit, as in others, did not permit use of the class action device under former Rule 23 where it appeared plainly that plaintiff could not properly protect the interests of the class. See *Austin* v. *Warner Bros. Pictures*, 19 F.R.D. 93 (S.D.N.Y. 1953).

Now that amended Rule 23 purports to obliterate the old distinctions between "true," "hybrid" and "spurious" class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members of the class are bound by the judgment unless they expressly ask to be excluded from the class. See amended Rule 23(c)(3), F.R.C.P.; *Lipsett* v. *United States, supra.*

Assuming *arguendo* that plaintiff has adequately set forth and shown compliance with other prerequisites of paragraph (a) of the new rule, he has not established that he "* * * will fairly and adequately protect the interests of the class." This alone is enough for this court to make a determination that this action cannot be maintained as a class action. See *Advisory Com. Notes*, 39 F.R.D. 100 (1966).

Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists. In disposing of a similar contention made in *Austin Theatre* v. *Warner Bros. Pictures, supra* at 96, Judge McGohey of this court said, "However, here there is required no more than a superficial inquiry to determine that the plaintiff has failed to allege any facts to show that it

will, as claimed, adequately represent the class." Such reasoning applies *a fortiori* under the new concept that all members of a class are bound by any judgment to be entered.

Eisen does not even attempt to estimate the extent of damages which he allegedly suffered as a result of the odd-lot differential, nor does he specify the nature or number of the transactions in which he engaged and wherein he was charged a "differential." A class action is premised in part upon the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. See *Aalco Laundry & Cleaning Co.* v. *Laundry Linen & Towel Chauffeurs & Helpers Union,* 115 S.W.2d 89 (Mo. App. 1938). From the facts as presented, it is impossible to determine and rule that Eisen can adequately protect the interests of the absent members of his asserted class. Concededly, he alleges that he has been an active investor in securities since 1960. We are not told, however, in what he invested. Even assuming, as Eisen would have us do, that he bought and sold securities in odd-lots—i.e. in less than 100 share blocks, we do not know which of the more than 1,600 available listed stocks he purchased or sold, the price ranges of the stocks or the considerations that motivated his transactions. That these are relevant facts is beyond serious question. In the six years during which Eisen claims to have been an investor, over 1,147-000,000 shares of stock were traded in odd-lot transactions. Some of the participants in these dealings were investors like Eisen, but just as certainly others were dealers, traders, arbitrageurs and speculators. The prices of the shares involved ranged from several dollars to several hundred dollars. The nature of the myriad odd lot transactions was certainly varied; orders were limited or contingent, on

margin or for cash, long or short, and for a fixed amount or on a long term investment plan.[1] In short, even if Eisen were given leave to serve an amended pleading setting forth with particularity the nature and amount of his own investment transactions, the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation.

Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the interests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or non-existence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent the class. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940); *McArthur* v. *Scott*, 113 U.S. 340 (1884). In *Pelelas, supra* at 632, the court held, "* * * under it [Rule 23] the court is at liberty to consider the number appearing on the record as contrasted with the number in the class. * * * There must be a sufficient number of persons to insure a fair representation of the class." Eisen himself estimates—perhaps too conservatively—that the class numbers in the hundreds of thousands.[2] Thus it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.

---

1. See Rule 124 of the New York Stock Exchange.

2. See defendant's affidavit by Sander Landfield wherein it is projected that there may have been as many as 3,750,000 odd-lot customers within the past four to six years.

By far the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class, in my judgment, is that stemming from subparagraphs (2) and (3) of amended Rule 23(c). In substance, these provide, *inter alia*, that in a class action the best notice practicable must be furnished to the class members and that the notice must specifically warn such persons that they will be bound by any judgment in the action unless they appear and request exclusion therefrom. Further, of course, it is provided in subparagraph (c)(3) that the judgment, whether favorable or unfavorable to the class, shall include all members of the class as found by the court and who do not appear and obtain specific exclusion.

As already suggested, this provision represents a most important substantive change from Rule 23 as it read prior to July 1, 1966. *Lipsett* v. *United States, supra.* Presumably aware of this change, Eisen claims to be the sole representative of hundreds of thousands of other persons who paid the odd-lot differential and who necessarily will be bound under Rule 23(c)(3) by any judgment in this action unless they specifically ask to be excluded after receiving appropriate notice. Yet he does not claim that one other person or entity has expressed the slightest interest in the prosecution of this action. See *Weeks* v. *Bareco Oil Co., supra* at 94. More important, Eisen and his counsel have taken the curious position in their papers and upon oral argument that press advertisements plus notices to stock exchange firms will constitute all the notice necessary in this case. To this, I am constrained to make two observations. First, in the light of the new concept under the amended Rule that members of a class are specifically bound by any judgment, favorable or unfavorable, unless they affirmatively "opt out", it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c)(2) and,

even more importantly, with due process standards. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-320 (1950). In other words, as defense counsel have incisively argued, both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a "mere gesture" for those who cannot be identified. Because of obvious practical financial limitations inherent in the circumstances here presented, proper notice as required almost certainly cannot be given—and plaintiff is short of the mark in his arguments to the contrary. Second, plaintiff's erroneous notion that individual notice to members of the class is not required by amended Rule 23 but that publication, either by "free publicity" or by paid advertisement in newspapers of national distribution, or by both, is sufficient, raises the suspicion, which may or may not be justified, that he is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. See *Advisory Com. Notes,* 39 F.R.D. 107; *Cherner* v. *Transition Electronic Corp.*, 201 F. Supp. 934 (DC. Mass. 1962).

For reasons similar to those leading me to conclude that Eisen cannot fairly and properly represent the other members of the class, I am not satisfied that the questions common to the class predominate over questions affecting individual members. Rule 23(b)(3); see *Advisory Com. Notes,* 39 F.R.D. 103. Mention has already been made of the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation and the necessarily varied nature and quantum of the interest of other odd-lot purchasers and sellers. In my view, these circumsatnces create a powerful presumption that questions affecting individual members predominate over questions common to the class,

and plaintiff has offered little or nothing to rebut this presumption. Moreover, these factors plus the previously discussed difficulties of providing adequate notice to the huge class as required by the amended Rule and by concepts of due process suggest almost insuperable difficulties in fair and proper management of this suit at a class action.

The motion of defendants is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually.

It is so ordered.

Dated: New York, N. Y.
September 27, 1966.

H. R. Tyler, Jr.
U.S.D.J.

ORDER DENYING CERTIFICATE UNDER 28 U. S. C. § 1292(b)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

October 25, 1966

This motion is denied. An intermediate appeal from the opinion and order filed on September 30, 1966 will not materially advance the ultimate resolution of this litigation. No controlling question of law is involved. Nothing has been done to prevent plaintiff from litigating his claims. See *Gottesman* v. *General Motors Corporation*, 268 F. 2d 194 (2d Cir., 1959); *Kroch* v. *Texas Company*, 167 F. Supp. 947, at 949 (S. D. N. Y., 1958).

It is so ordered.

H. R. TYLER, JR.
U. S. D. J.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 19, 1966 (WATERMAN, MOORE AND KAUFMAN, CIRCUIT JUDGES) DENYING DEFENDANT'S MOTION TO DISMISS APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1966

(Argued December 12, 1966 Decided December 19, 1966)

Docket No. 30934

[SAME TITLE]

KAUFMAN, Circuit Judge:

The sole question presented by this motion is whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims.

Morton Eisen brought an action in the district court alleging that two major "odd-lot" dealers on the New York Stock Exchange—Carlisle & Jacquelin and DeCoppet & Doremus—had conspired and combined to monopolize odd-lot trading, and had charged excessive fees, in violation of the Sherman Act. 15 U.S.C. §§1, 2. Specifically, he challenged the so-called "odd-lot differentials" charged by the appellee and other odd-lot dealers for transactions involving other than 100 share lots of securities. The complaint also charged the New York Stock Exchange with having breached its duties, allegedly proscribed by the Securities Exchange Act of 1934, concerning suspension of odd-lot trading. 15 U.S.C. §§78f(b), 78f(d), 78s(a).

Eisen sued both for himself and on behalf of all odd-lot purchasers and sellers on the Exchange. Appellees moved to dismiss the class action, alleging that it was not maintainable under amended Rule 23(c)(1) of the Federal Rules of Civil Procedure. Judge Tyler granted the motion and dismissed the class action, but did not dismiss Eisen's individual claims or pass on their merits.

It is too clear for discussion that all orders are not appealable. 28 U.S.C. §1291 provides that the courts of appeals have jurisdiction of appeals from all "final" decisions of the district courts, while 28 U.S.C. §1292 permits appeals from a narrowly limited class of interlocutory orders. But as the Supreme Court has commented, "[A] decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964). The question presented to us, therefore, is whether Judge Tyler's order dismissing the class action falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

In making this determination, Justice Douglas' language in the *Gillespie* case is instructive:

> [I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality be given a *"practical rather than a technical construction."* • • •
>
> [I]n deciding the question of finality the most important competing considerations are "the incon-

venience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-53 (emphasis supplied).

In the present case, these considerations, rather than being "competitive," lead to a single conclusion—that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order "if unreviewed, will put an end to the action." Chabot v. National Securities and Research Corp., 290 F. 2d 657, 659 (2d Cir. 1961). We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. See Escott v. Barchris Constr. Corp., 340 F. 2d 731, 733 (2d Cir.), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U.S. 816 (1965). If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

There are, therefore, most compelling reasons to deny this motion to dismiss the appeal; and permitting Eisen to proceed in no way conflicts with any precedents of this Court. Appellees rely on Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2d Cir. 1944), but that decision was reached before the Supreme Court spoke in *Cohen, supra.* While it is true that in Lipsett v. United States, 359 F. 2d 956 (2d Cir. 1966), we did not permit an appeal from the dismissal of a class action, we reached that conclusion because the facts did not come within the framework of the *Cohen* doctrine; the plaintiffs lacked standing, and dismissal of the class action allegations, we said, merely "prettified" the pleadings since the action could still continue.

Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly

situated, for, as we have already noted, it will, for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. See Roberts v. U.S. District Court, 339 U.S. 844 (1950); *Chabot* v. *National Securities and Research Corp., supra.*

Motion denied.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 13, 1967, DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September term 1966

Docket No. 30934

[SAME TITLE]

Carter Ledyard & Milburn, New York, N. Y., for Carlisle & Jacquelin, appellee.

Kelley Drye Newhall Maginnes & Warren, New York, N. Y., for DeCoppet & Doremus, appellee.

Milbank, Tweed, Hadley & McCloy, New York, N. Y., for New York Stock Exchange appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

s/ J. EDWARD LUMBARD
Chief Judge

13 January 1967

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 13, 1967, DENYING PETITION FOR REHEARING

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Milbank, Tweed, Hadley & McCloy, New York, N. Y., for New York Stock Exchange, appellee.

Motion denied.

S. R. W.
L. P. M.
I. R. K.
U. S. C. JJ.

January 13, 1967

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 8, 1968 (MEDINA AND HAYS, CIRCUIT JUDGES) REVERSING AND REMANDING AND DISSENTING OPINION OF CHIEF JUDGE LUMBARD

UNITED STATES COURT OF APEALS
FOR THE SECOND CIRCUIT

No. 78—September Term, 1967.
(Argued November 6, 1967 Decided March 8, 1968.)

Docket No. 30934

[SAME TITLE]

MEDINA, Circuit Judge:

On this appeal we are presented with significant questions involving the interpretation of recently amended Rule 23 of the Federal Rules of Civil Procedure. Morton Eisen instituted this action seeking damages and injunctive relief on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange against Carlisle & Jacquelin and DeCoppet & Doremus, alleging that the two brokerage firms had combined and conspired to monopolize odd-lot trading, and had fixed the odd-lot differential at an excessive amount in violation of the Sherman Act. 15 U.S.C. Sections 1, 2. A third count alleged that the defendant New York Stock Exchange had failed to discharge its duties under the Securities Exchange Act of 1934 by neglecting to adopt rules protecting investors in odd-lots. 15 U.S.C. Sections 78f(b), 78f(d), 78s(a).

Following a motion by defendants for a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, Judge Tyler held that the suit could not be

brought as a class action. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966). A motion to dismiss the present appeal because the decision below constituted a non-final order has previously been denied by this Court. *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967). In dismissing the class action the District Court found that plaintiff failed to demonstrate that he would be able fairly and adequately to protect the interests of the class, Fed. R. Civ. P. 23(a)(4); that the notice required by due process and the rule, Fed. R. Civ. P. 23(c)(2), could not be given and that questions common to the class did not predominate over questions affecting individual members. Fed. R. Civ. P. 23(b)(3).

At the outset, it is necessary briefly to describe the mechanics of odd-lot trading on the New York Stock Exchange. The regular unit of trading on the Exchange is the "round lot" of 100 shares. An "odd-lot" is the term used to designate transactions involving less than 100 shares. Odd-lot orders do not form part of the "regular auction market" but are exclusively handled by special odd-lot dealers who buy and sell for their own account as principals. In order to purchase or sell an odd-lot an individual first contacts a brokerage firm which then places an order with the odd-lot dealer. The cost to the customer includes both a standard commission payable to the brokerage firm and the odd-lot differential which is received by the odd-lot dealer. The differential is a figure amounting to a fraction of a point for each share traded, which is added to the customer's purchase price and deducted from the sale price. During the period of time in which plaintiff had alleged he was involved in the odd-lot market, covering the years 1960-1966, the differential was ⅛th of a point (12½ cents) per share on stock selling below $40 per share and ¼ of a point (25 cents) per share on stock selling at $40 or above per

share.[1] Over the years odd-lot trading has accounted for a fairly steady percentage of the total volume on the Stock Exchange, ranging from a high of 12.9% in 1937 to a low of 7.9% in 1950 and 1958. For example, recent figures indicate that in 1961 the volume of odd-lot transactions totaled 214,018,834 shares. SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, Pt. 2, 88th Cong. 1st Sess. 171-202, 393 (1963), hereinafter cited as SEC Special Study. Defendants Carlisle & Jacquelin and De-Coppet & Doremus are engaged exclusively in odd-lots and collectively they handled 99% of the volume in odd-lot transactions. SEC Special Study at 172. Various alleged abuses in odd-lot trading disclosed by the SEC in 1963, form, in large part, the basis of the present action. See SEC Special Study at 171-202.

I.

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both liminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives. Class actions were divided into various categories reflecting the "jural relationships of the members of the class." See 3 Moore, Federal Practice par. 23.08 at 3434 (2d ed. 1953). Only after a determination of the nature

1. The above figures do not reflect the change made in the differential which was effective as of July 1, 1966. Subsequent to that time the so-called "breakpoint" was raised to $55, with the differential amounting to ⅛th of a point on stock sold below that figure and ¼ of a point on stock sold above it.

of the rights: "joint, common or secondary" in the true class action, "several related to specific property" in the hybrid class action, and "several affected by a common question and related to common relief" in the spurious class action, was a court able to proceed. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965), hereinafter cited as Advisory Committee's Note. There were significant differences in the *res judicata* effects accorded to the various class actions. Thus while a judgment in a true class action was binding on the entire class, the spurious class action only concluded the rights of parties. 3 Moore, Federal Practice par. 23.11 at 3472 (2d ed. 1953). Since the great majority of cases fell into this latter category, the objective of determining all questions in one suit was effectively frustrated. In essence, the spurious class action was interpreted as merely a permissive joinder device.[2] See *Carroll* v. *American Federation of Musicians*, 372 F. 2d 155 (2d Cir. 1967); *Fox* v. *Glickman Corp.*, 355 F. 2d 161 (2d Cir. 1965), *cert. denied* 384 U.S. 960 (1966); *Nagler* v. *Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957); *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). But see *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941) (dictum).

To avoid the problems associated with the original rule the Advisory Committee on the Rules of Civil Procedure has completley redrafted Rule 23 in order to provide a thoroughly flexible remedy. Throughout the course of a proceeding courts are given complete control to give assurance that the procedures adopted are fair, reasonable and

2. There was a serious split in court decisions on the subject of the permissibility of "one-way intervention." Under this procedure, absent class members in a spurious action were permitted to intervene after a favorable judgment, while at the same time they were not bound by an unfavorable decision. Advisory Committee's Note at 105.

effective. All actions will result in judgments binding on the entire group of individuals found by the court to be members of the class. Fed. Rule C. P. 23(c)(3). While the new concepts incorporated in the rule have not as yet been passed upon by any federal Court of Appeals,[3] they have received somewhat less than an enthusiastic reception in the District Courts. Compare *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967), expressing grave doubts about the propriety of a rule which binds absent but described class members, with *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) which upholds a class action brought by 5 franchise dealers on behalf of a class of over 700 dealers, alleging anti-trust violations. Nevertheless, the majority of courts have upheld the validity of representative actions brought under the new rule. See, e.g., *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966); *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967). But see *Richland* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Hohmann* v. *Packard Instrument Co.*, 43 F.R.D. 192 (N.D. Ill. 1967); *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Berger* v. *Purolator Products, Inc.*, 41

3. The Fifth Circuit has on two occasions been presented with issues under the new rule. However, each of these cases involved aspects of class actions which are similarly handled under both the original and the amended rule 23. In one case the 5th Circut held that claims could not be aggregated under the new rule to meet the jurisdictional amount in a suit which formerly would have been classified as a spurious action. *Alvarez* v. *Pan American Life Ins. Co.*, 375 F. 2d 992 (5th Cir. 1967). The other case involved a routine denial of a class action because the representative and the class members had conflicting interests in the subject matter of the suit. *Anderson* v. *Moorer*, 372 F. 2d 747 (5th Cir. 1967).

F.R.D. 542 (S.D.N.Y. 1966). Although representing a totally different approach to class actions, the new rule does retain two standards which were embodied in the old rule, namely, the class must be so numerous as to make it impracticable to bring every member before the court, and the representative party must be able fairly and adequately to protect the interests of the entire class. Necessarily the old case law will furnish some guidance in defining these concepts.

II.

To be maintainable as a class action a suit must meet all the requirements set forth in Section 23(a)[4] and also fall within one of the subsections of 23(b).[5]

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4. "Rule 23. *Class Actions*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

5. "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatable standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Plaintiff has alleged that he was engaged in odd-lot trading during the years 1960-1966. Though estimates of the number of class members similarly engaged in this activity during those years have varied, all the litigants concede "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants' "rough" approximation, not disputed by plaintiff, would place 3,750,000 individual and corporate buyers and sellers of odd-lots in the class. Similarly, the allegation that a conspiracy, whose object was to charge excessive rates on odd-lot transactions existed between the two brokerage firms, satisfies the requirement that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Furthermore, plaintiff's claim is "typical of the claims * * * of the class." Fed. R. Civ. P. 23(a)(3). Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers. However, defendants have argued that different members of the class will have varying theories as to what constitutes the "excessive price," and other class members may be satisfied with the present price policy.[6] Nonetheless, all members

5. (Cont'd.)

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

6. For example, defendants maintain that a purchaser of an odd-lot at a cost below the "breakpoint" figure might urge that the differential be revised for the benefit of his class (stock selling at $40 or above) at the expense of the other class (stock selling below $40).

of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive.

Inability on the part of the plaintiff to "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), was considered by the District Court to be one of the primary reasons for dismissing the class action. We believe the court employed incorrect standards in reaching this result.

Since Eisen had not alleged with specificity the nature of his various odd-lot transactions, the court below felt it lacked sufficient information properly to assess his qualifications as a representative, and, even if such information were alleged, "the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966). The District Judge also felt it was impossible to assume that plaintiff "alone with a comparatively minuscule and limited interest in odd-lot transactions" could represent a class numbering at least in the hundreds of thousands, which encompassed individuals with much larger and different interests. *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966).

Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

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6. (Cont'd.)

However, plaintiff, as demonstrated by his answers to interrogatories, has purchased stock at prices both above and below the prevailing breakpoint. It seems farfetched to argue that plaintiff will adopt a position detrimental to his own interest. If plaintiff does pursue a self-defeating course of conduct, the class action may then be dismissed on the ground that he has failed adequately to represent the entire class. The court is also empowered to divide the present class into appropriate sub-classes. Fed. R. Civ. P. 23(c)(4).

Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. See *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, a court must now carefully scrutinize the adequacy of representation in all class actions.

What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940). Courts, on occasion, have also required that the interest of the representative party be co-extensive with the interest of the entire class, but this amounts to little more than an alternative way of stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. See *Richard* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967). However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited, see, e.g., *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), *cert. denied* 311 *U. S.* 700 (1940), but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed.

As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966). Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. See *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). But to dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966), and that the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

We are not persuaded that it is essential that any other members of the class seek to intervene. Absent class members will be able to share in the recovery resulting in the event of a favorable judgment, and, if they wish to avoid the binding effect of an adverse judgment they may in various ways and at various times that we need not now attempt to particularize, attack the adequacy of representation in the initial action or disassociate themselves from the case. *Hansberry* v. *Lee*, 311 U. S. 32 (1940); see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 436 (1960). If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack

of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.

Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, see *Hess* v. *Anderson, Clayton & Co.*, 20 F. R. D. 466 (S. D. Cal. 1957), but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval.[7]

It is also worthy of note that the rule contains provisions which, by themselves, are designed to insure proper representation. For example, 23(e) requires court approval of a settlement, thus minimizing the danger that the rights of the class will be unfairly compromised. Accordingly, we decide that the District Court should reconsider the adequateness of plaintiff's representation in the light of the standards which we have set forth in this opinion.[8]

III.

In addition to complying with the requirements of Section (a) of Rule 23, a potential class action must also

7. At various points in its commentary the Advisory Committee has referred to an article written by former Professor (now Judge) Jack B. Weinstein. In speaking of the adequacy of representation question Weinstein has said: "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his right. * * * The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 460 (1960).

8. Inadvertently the court below did not notice that plaintiff, in answer to interrogatories, specifically listed his transactions in odd-lots. His damages were estimated at $70.

satisfy the requirements of one of the three subsections of 23(b).[9] Plaintiff has argued that the present action is maintainable under all three subsections of 23(b). However, we believe both 23(b)(1)(A)[10] and 23(b)(2) are not applicable to the present factual situation. Subsection (b)(1)(A) authorizes a class action if "the prosecution of separate actions by or against individual members would create a risk of * * * inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Plaintiff has effectively rebutted his own argument because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation. Under these circumstances there is little danger that individual suits will establish "incompatible standards of conduct" for the defendants. Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory. Advisory Committee's Note at 102.

We must also note that plaintiff's effort to qualify the action under 23(b)(1) and 23(b)(2) was induced by his erroneous theory that notice is not "mandatory" under these sections. This theory is based on the assumption that 23(c)(2)[11] provides the only "mandatory" notice required

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9. See footnote 5, *supra*.

10. Plaintiff does not now claim that 23(b)(1)(B) is applicable.

11. Rule 23(c)(2):

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date;

by the new rule. Since this particular section refers exclusively to actions brought under 23(b)(3), other suits cognizable under either 23(b)(1) or 23(b)(2) would only be subject to "discretionary" notice under 23(d)(2).[12] Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Advisory Committee's Note at 107.

Ultimately plaintiff must fall back on subsection (b)(3), which in effect corresponds to the old spurious class action. Presumably influenced by the same thinking which relegated the old spurious class action to the position where it was used primarily as a device for permissive joinder, the Advisory Committee has commented that "class action treatment is not as clearly called for [in (b)(3) situations] but it may nevertheless be convenient and desirable depending upon the particular facts." Advisory Committee's Note at 102. A court, under this subsection, is thus required to find that the questions of law or fact common to the class predominate over questions affecting individual members

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11. (Cont'd.)

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

12. Rule 23(d):

"(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *."

and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Moreover, resolution of the issue concerning the propriety of a suit under 23(b)(3) involves an assessment of various factors, including among others, "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "(D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

The District Court felt "the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation" and the "varied nature and quantum of the interests of other odd-lot purchasers and sellers" necessarily compelled a finding that questions affecting individual members predominated over questions common to the entire class. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

However, under both the old and the amended rule 23, anti-trust violations practised upon large groups of individuals have been held to involve sufficient common questions of law or fact to merit treatment as class actions *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir.), *cert. denied* 344 U.S. 820 (1952) (old rule); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965) (old rule); *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) (new rule); but see *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) (new rule). The Advisory Committee has specifically noted that "concerted anti-trust violations may involve" predominantly common questions.

Advisory Committee's Note at 103. Suits alleging violations of Section 10(b) of the Securities Exchange Act, though often involving separate consideration of the elements of misrepresentation and reliance as they affect individual members, have also been accorded treatment as class actions under the new rule. *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); but see *Berger* v. *Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966).

We realize that members of the proposed class might have had different motives when they entered into the odd-lot market.[13] We are also mindful of the fact that there may be a wide variety of orders some of which may require special handling by the odd-lot dealer.[14] Nevertheless, the alleged underlying conspiracy does contain a so-called "common nucleus of operative facts." *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). All of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action. *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E. D. Pa. 1965). Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages. Fed. R. Civ. P. 23(c)(4); Advisory Committee's Note at 106. Even

13. For example defendants have referred to the different motives present in the following class members: investors, traders, speculators and arbitrageurs.

14. Defendants have listed 20 different types of orders including, among others, varying forms of limit orders, contingent orders and market orders.

if individual questions arise during the course of litigation, which render the action "unmanageable," the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself. Fed. R. Civ. P. 23(c)(1). Therefore, at this early stage of the proceedings, we find there has been an adequate demonstration that common questions of law or fact predominate over individual questions. See *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41, F. R. D. 42 (S. D. N. Y. 1966).

Before allowing a suit to proceed under 23(b)(3) the trial court must also find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Although defendants argue that intervention and permissive joinder[15] are both superior to a class action, implicit in Judge Kaufman's prior opinion above referred to, denying defendants' motion to dismiss the appeal for lack for jurisdiction, is the assumption that the only feasible way to litigate these claims is by a class action.[16] The odd-lot differential payable on any one transaction under the rate schedule in effect at the time the complaint was filed ranged from 12½ cents to $24.75.[17] Plain-

15. In one of the first articles criticizing old Rule 23 joinder was described as a situation which "presupposes the prospective plaintiffs advancing en masse on the courts." Surely that is not the case in the instant action. Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941).

16. "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, * * * it will for all practical purposes terminate the litigation." *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119, 121 (2d Cir. 1966), *cert. denied* 386 U. S. 1035 (1967). Judge Kaufman had assumed that $70 would be a reasonable estimate of plaintiff's damages. "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." *Eisen* v. *Carlisle & Jacquelin, supra* at 120.

17. Thus the minimum figure would apply where the transaction involves one share of stock selling for a price under $40. The maximum figure would apply where the transaction involved 99 shares selling for a price of $40 or above.

tiff engaged in 47 odd-lot transactions between 1960 and 1966 paying a total of $259 in odd-lot differentials. Recognizing the nature of the odd-lot differential and the type of investors who often engage in these transactions, we think it highly unlikely that any one potential plaintiff would have sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim.[18] Thus the present case appears to fall within that class of cases in which "the interests of individuals in conducting separate lawsuits" are more "theoretic than practical" since "the amounts at stake for individuals (are) * * *so small that separate suits would be impracticable." Advisory Committee's Note at 104. This belief is reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit. In any event, we are bound by Judge Kaufman's ruling as the law of this case.

Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations,[19] we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them. Concededly, the damages for invidual class members will be small and the possibility remains that the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sus-

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18. The possibility, as suggested by defendants, that a court may grant attorney's fees in excess of the damages awarded does not provide a meaningful alternate. It is unlikely that a plaintiff with a small claim will undertake complex anti-trust litigation on the remote possibility that a court may award anything like compensatory attorney's fees.

19. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251, 295-98 (1966).

tained. On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684, 686 (1941).[20] Moreover, in the present case there is apparently no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system. See Comment, Recovery of Damages in Class Actions, 32 Univ. of Chicago L. Rev. 768, 785 (1965).

Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action. Defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of Special Masters, printing, postage and so on. Procedures should be outlined with regard to possible intervention by other class members and provisions made for the filing of claims. The court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue. There may conceivably be questions of jurisdiction or venue, as well as of demands for a jury trial.

In view of the arguments previously discussed relating to the necessity for separate computation of damages because of the variety of services performed by the defendant-

20. Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about $17,000,000. Over 85% of the claims were for less than $25 and refunds were made to more than a million people. See *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), *cert. denied* 307 U. S. 648 (1939).

dealers, it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action.[21] However, we do not express any opinion on this subject and we simply note that other courts in similar cases have been able to set up formulas of procedure for recovery that are applicable to an entire class. See, e.g., *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *petition for cert. dismissed* 371 U. S. 801 (1962). The court may also find that it is too early in the proceedings adequately to determine potential damage questions and hence that a decision on the propriety of a class action may have to be postponed.

IV

The notice requirement of 23(c)(2), as recognized by Judge Tyler, presents what may turn out to be the most serious obstacle to the maintenance of the present action. Subsection 23(c)(2) provides:

> "In any class action maintained under (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel."

21. As previously discussed, it would also be possible to order separate consideration of the question of damages.

The District Judge held that "both the Rule and concepts of due process require individual notice for the class members who can be identified." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966). As a result of "practical financial limitations" present in the instant case, he was of the opinion that the notice requirement could not be met. Publication plus the mailing of individual notice to stock exchange member firms was rejected as a possible alternative method.

While the Supreme Court has recognized that class actions represent an exception to the general rule under which only parties are bound by a judgment, the procedure adopted must conform to the requirements of due process and fairly insure the protection of absent parties who are to be bound. *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940). Notice, as an integral part of due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(d)(2)[22] were intended to fulfill the requirements of due process established in *Hansberry* and *Mullane*. Advisory Committee's Note at 107. The Advisory Committee also sought to ensure that individual interests would be respected in (b)(3) cases by giving class members the opportunity to avoid being bound by the judgment if they requested exclusion and so informed the court.

The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff.[23] Appellant has argued that mail

22. See footnote 12, *supra*.

23. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.

notice to the entire class would cost approximately $400,000, and, therefore, must be deemed impracticable within the context of 23(c)(2). Consequently, a decision requiring such notice would effectively foreclose all opportunity to secure relief. Plaintiff contends that publication is "the best notice practicable under the circumstances." On the other hand, defendants suggest that cost considerations should not prevent many class members from receiving the individual notice they are entitled to both by the requirements of due process and by the terms of 23(c)(2), since their identities are "very easily ascertainable." *Schroeder* v. *City of New York*, 371 U. S. 208 (1962).

The District Courts have been inconsistent in their interpretations of the notice requirement under the new rule. One opinion reads 23(c)(2) as requiring that actual notice be given to all absent class members, *Richard* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967), while another has permitted a representative to use notice by publication to inform an entire class in a taxpayer's suit. *Booth* v. *General Dynamics Corps.*, 264 F. Supp. 465 (N. D. Ill. 1967). See also *Harris* v. *Jones*, 41 F. R. D. 70 (D. C. Utah 1966), requiring individual notice to be given to 1500 class members in an action for violation of Rule 10b-5 of the Securities Exchange Act because all the names and addresses were on file and available.

On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom

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23. (Cont'd.)

L. Rev. 356, 398 (1967); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251 at 300. We fail to see any support for the position adopted in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967) that the court itself has the burden of sending out the proper notice.

the action is stated to be commenced and maintained. But we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice. Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c)(2); there was also a lack of evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2) to which reference has already been made.

Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate, what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?

The affidavits before us are conclusory in character and they merely scratch the surface. For example, a general partner in Carlisle & Jacquelin in his affidavit states that there is no way in which his firm could identify the odd-lot customers.[24] Similarly, a general partner in a large member firm on the New York Stock Exchange declares that there is no ready way to separate odd-lot customers from round lot customers and that to determine which customers had odd-lot transactions in recent years would require sorting of approximately 300,000 to 400,000 names of customers.[25] Finally a general partner in another large member firm expresses his belief that there is no way of obtaining exact

24. Affidavit of Sander Landfield, general partner of Carlisle & Jacquelin, offered in support of motion to dismiss class action.

25. Affidavit of Dean Witter, Jr., general partner in Dean Witter & Co., offered in support of motion to dismiss class action.

information about odd-lot transactions without analyzing the history of each account, a task which would be "virtually impossible."[26] Nevertheless, both on argument and as part of their briefs, defendants have argued that "many (odd-lot customers) can, in fact be identified through the appellee firms and the brokerage houses."

On remand the court may find that the names of certain class members, because of their widespread dealings in odd-lots, may be readily ascertainable. Arguably these class members may possess enough of a stake in the proceedings to justify personal intervention. At this point the court will then have to consider once again the question of publication. Under certain circumstances published notice may amount to the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant. Similarly, in other cases publication has been rejected as insufficient notice where it was sought to be used by the City of New York, *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), the New Haven Railroad, *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) and the City of Hutchinson, Kansas, *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956). Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

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26. Affidavit of Edwin B. Peterson, general partner in Francis I. du Pont & Co., offered in support of motion to dismiss class action.

It may be that in some situations it is better at the outset to decide that the proceeding may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the efficiency of the representation or the notice to be given, or the feasibility of meeting problems of judicial administration. In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted.

Finally, it is worthy of note that in dismissing the action as one including "a myriad of complex, frustrating, needless problems in attempted management" the District Court in *School Dist. of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1006, commented that, prior to the dismissal there had been "numerous hearings and conferences."

Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditions evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.

LUMBARD, *Chief Judge* (dissenting):

It seems to me that we should affirm Judge Tyler's ruling that this is not a proper class action because it is so clearly right on two counts: the impossibility of the plain-

tiff giving suitable notice and the unmanageability of this suit as a class action. I would not remand to the district court to do the obvious and the unnecessary.

What could be less of a class action than a suit where there are more than 3,750,000 potential plaintiffs living in every state of the union and in almost every foreign country? If this is a "class," it is so large and indiscriminate that a substantial proportion of its membership will have no idea whatever that they belong to it. Just how a notice can be worded which could alert so large a "class" to the possibility that proceedings in the Southern District, if carried forward, would someday enrich each one by a few dollars, if there be anything left after expenses and attorneys' fees, is a mystery to me.

Indeed, the question of how to give any notice which would be sufficient to meet constitutional requirements is so impossible of solution that my colleagues choose to ignore it.

If the plaintiff, who has participated in some 247 [corrected by Lumbard on 3/13/68] transactions over a period of years, estimates his damages at only $70, is it not evident that the overwhelming majority of all possible plaintiffs would expect at best to receive considerably less than $70? And what is sufficiently interesting about the expectation of such a recovery, available if at all, only after several years of litigation, to lead us to suppose that any considerable number would bother to respond to the notice. Despite articles in the May 3, 1966 edition of the New York Times and the May 4, 1966 edition of the Wall Street Journal no one has joined Eisen in this section. See *Berger* v. *Purolator Products,* 41 FRD 542, 544 (SDNY 1966). Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.

In any event, plaintiff suggests no way in which he can give notice to his 3,750,000 potential brothers-in-litigation

which could conceivably attract the attention of any appreciable number of them. Who is to advise foreign class members who do not read or understand English, and how is this to be done? Who is to pay for class notice, and for the subsequent notice of any step in the action which the Rule says must be given?

To me, these illustrations of the practical and insurmountable difficulties that would be encountered in administering this action as a class suit underscore that Judge Tyler could only have exercised his discretion as he did. As a class action the claim is totally unmanageable. See *School District of Phildelphia* v. *Harper & Row Publishers, Inc.*, 11 FR Serv. 2d 23.b.3, Case 1, 23.b.3-3 (E.D. Pa. April 24, 1967).

Even if all of the difficulties inherent in the administration of the suit were overcome, the amount expended in filing and processing claims would probably exceed any recovery. *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U.S. 648 (1939) is inapposite. In that case the telephone company had sought an interlocutory injunction against an Illinois Commerce Commission order requiring reduction of certain of its rates. The interlocutory injunction was granted, conditioned upon an undertaking by the telephone company to refund to its subscribers any sums paid by them in excess of the proposed reduced rates should the company lose its suit. The company had already collected the money and had laid it aside. The Supreme Court eventually ordered the injunction dissolved and that refunds be made in accordance with the terms of the injunction. *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U.S. 151 (1934). The telephone company agreed to undertake the task of making refunds and to assume the costs of the distribution. The payments were not made by the Court, but by the company

under the supervision of a representative of the court. 102 F. 2d at 61.

In this case, unlike *Slattery*, the potential claimants have no direct business dealings with the parties which plaintiff seeks to hold liable, and therefore defendants are in no position to identify from their own records the potential claimants, let alone calculate the amounts of any refund that they may be found entitled to receive.

Here no one can ascertain whether any recovery will be due any particular plaintiff until the case has been litigated, and, if any recovery is decreed, there must follow an enormous number of calculations regarding the dealings of each plaintiff who is entitled to any recovery. And even after that the court would have to pass upon the expenses and fees to be deducted from any recovery.

Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they ever intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of $70. Rule 23(b)(3) requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy, and requires that the court consider "the difficulties likely to be encountered in the management of a class action" in making its determination. See *Berley* v. *Dreyfus & Co.*, 11 FR Serv. 2nd 23.b.3, Case 6 (SDNY Dec. 22, 1967). While this court has determined that dismissal of the class action "will for all practical purposes terminate the litigation," 370 F. 2d at 121, Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. As the Advisory Committee's Note suggests, "one or more actions

agreed to by the parties as test or model actions may be preferred to a class action * * *" If plaintiff's case has any merit and his counsel are of excellent calibre, as he asserts, I see no insuperable barrier to organization by plaintiff, with the assistance of counsel, of a group of members of the purported class to sponsor this litigation as a test case with Mr. Eisen as the sole plaintiff. Even if a test case is not financially expedient from the viewpoint of plaintiff and his legal advisors, its obvious administrative advantages compel me to reject the unmanageable class action as an alternative. See *Richland* v. *Cheatham,* 11 FR Serv. 2d 23.a.52, Case 2, 23.a.52-12 (SDNY July 27, 1967).

Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.

The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 8, 1968, REVERSING AND REMANDING.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 78—September Term, 1967.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant.

A. DAVID FUSARO,
Clerk.

TRANSCRIPT OF RECORD OF PROCEEDINGS DATED APRIL 30, 1970.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

New York, New York
April 30, 1970—2:15 P.M.

Before:

Hon. HAROLD R. TYLER, JR., District Judge.

Appearances:

Mordecai Rosenfeld, Esq., Attorney for Plaintiffs.
Carter, Ledyard & Milburn, Esqs., Attorneys for Defendant Carlisle & Jacquelin, By: Devereux Milburn, Esq., Louis L. Staunton, Jr., Esq., of Counsel.

Kelley, Drye, Newhall, Maginnes & Warren, Esqs., Attorneys for Defendant DeCoppet & Doremus,

By: Francis S. Bensel, Esq., of Counsel.
Milbank, Tweed, Hadley & McCloy, Esqs., Attorneys for Defendant New York Stock Exchange, By: William E. Jackson, Esq., of Counsel.

The Court: Gentlemen, I am sorry that we have to proceed in this somewhat foreboding and gloomy atmosphere, but I think because of our numbers and matters which I assume you may wish to spread yourselves out a bit and ask a few questions of a few witnesses.

Now, where are we going? In what direction do we proceed today from your point of view?

Mr. Rosenfeld: As I understand it, the defendants are going to offer witnesses on the manageability question?

The Court: What about you, do you wish to offer any witnesses?

Mr. Rosenfeld: I do not, your Honor.

The Court: At least for the nonce, let us assume. It may be that you may want to change your mind.

Mr. Stanton: I think our program, your Honor, for the other side of the case was to first offer in evidence stipulations Numbers 1 and 2. You, I believe, have seen stipulation Number 1, and perhaps the original of that is already on file.

The Court: It should be, you are quite right. At least I think it should be.

Mr. Stanton: I would think on consent I could offer in evidence Stipulation Number 2, which we have previously signed and it is dated April 17.

The Court: All right, very good. Let me just check and make sure.

I am sorry to report that the file doesn't seem to have the stipulation.

Mr. Stanton: Your Honor, I have another copy.

The Court: My law clerk just reminds me of something which I have overlooked. He was correct, here it is. Mr. Rosenfeld sent it in in March and here it is.

Mr. Stanton: I think we offer that in evidence as well, your Honor.

The Court: All right, we shall do that.

(Defendant's Exhibits A and B received in evidence.)

Mr. Stanton: We have considered, your Honor, that without a separate offer the papers on the original motion, that is, the notice of motion and supporting affidavits and

opposing material are also open to consideration as part of the record before you.

The Court: I would think so. I don't think we have to mark them as exhibits. They are part of the file. I would think both you at the back table and Mr. Rosenfeld would agree that that is still before the Court, as it were.

Mr. Stanton: That includes, then, your Honor, Plaintiff's answers to interrogatories, which were similarly part of the file.

The Court: Yes, because it seems to me that what really is involved here, to coin an old state practice phrase, in the present posture of our case really brings up the whole record so far.

Mr. Stanton: That is the way we viewed it.

The Court: Yes, I don't think anybody would disagree with that.

Mr. Stanton: Then I think that all we have to add this afternoon are two witnesses, each of whom we expect will be rather brief and we are prepared, if your Honor would like us to do that.

The Court: Fine.

Mr. Stanton: May we have Mr. Paul Martin, please.

PAUL ROBIN MARTIN, called as a witness having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Stanton:

Q. By whom are you employed, Mr. Martin? A. Walston & Co., Inc.

Q. What is your position with Walston & Co., Inc.? A. Vice-president, manager of systems and programming.

Q. What does that responsibility include? A. The design and implementation of automated brokerage systems at Walston & Co.

Q. For how long have you been familiar with Walston & Co.'s data processing and automated systems? A. Approximately nine and a half years.

Q. Is the system at Walston & Co. generally typical of those of other automated houses, brokerage houses on the street, to the best of your knowledge? A. Yes, sir, it is.

Q. What is the source of your knowledge in that connection? A. The greater part is my experience at Walston, but also through discussion with my colleagues on Wall Street through the years. In the capacity as a programmer et cetera, up through the capacity of manager of the systems and programming department.

Q. Would you describe for the Court, please, the steps or processes which would have to be gone through in order to supply for any customer of Walston his odd lot purchases and sales for a given period of years, say roughly a period of four years extending backwards from 1967? A. Well, assuming that we would be supplied the customer identifier, such as an account number, we would have to take a short period of time to determine the criteria by which—that we would use. The elements of the program that would have to be written to scan the available files that we do have in our records, magnetic tape files, that is.

We would have to prepare this program and actually apply it against these files in the appropriate number of runs. Each year would consist of a separate file and we would have to run against—the file for each year, extracting again the appropriate information for each client.

Q. Let me be a little clearer about the appropriate information. You would prepare a program, a key to the

customer's account number? A. Yes.

Q. Would there be a cost for preparing that program? A. Yes, there would be.

Q. Can you give a fair estimate of the cost or a range of figures, perhaps? A. We are talking about probably a program that would take a week to write and implement, so we are talking about 500 to a thousand dollars in cost.

Q. That would prepare a program of search for the tapes containing the files for the years? A. That's right, yes.

Q. And then that program would be applied against each year's records? A. That's right.

Q. I think you told us the records were stored in magnetic form on tape. A. That's right.

Q. How many tapes are there for each year or approximately how many? A. Approximately 20 to 25 tapes per year.

The Court: You say the cost would be what, I didn't get that figure?

The Witness: Approximately $500 to $1000 to prepare the program to perform this search.

Q. So for the years 19—for a six-year period, you would have to search approximately 120 reels of tape? A. That is right, yes.

Q. How long would that process require? A. Oh, probably 12 to 15 hours continuous running time.

Q. Is there a cost for that? A. Oh, yes.

Q. What would that cost? A. That would depend upon the computer that we used. Again, also the length of time it would take would depend on whether it was a high performance computer or one of our lower performance, but I would say an average cost would be about $200 an hour. That is minimum. Not including the cost for the operator and materials or whatever would be involved.

Q. What types of materials are involved? A. Well, this would have to be output in a paper form for reference. That would be pretty much the extent of it.

Again if this program was to not only put it output on paper, but if it had to be referred to again, instead of going through the entire files, one might want to put it out in magnetic tape as well for just the information that we did extract from the original pass.

Q. That would be an additional cost, I suppose? A. Yes.

Q. So without regard for employee's time or for such materials as paper, the search for the account number through the reels for the years involved would cost about $3000, is that a fair statement? A. That's right.

Q. Would the printout be completely accurate or would you regard it as completely accurate when that process was done? A. I would have to say 99.9 per cent accurate because it would include original transactions as well as cancellations and this type of thing to an original transaction, so that if one of these items was lost in some way through the years, not from the tape but it was never handled properly, cancelled, or something of this sort, it wouldn't match against the original transaction. These are kind of subtle errors that can happen, you see.

Q. But the process would produce a result with a very high degree of accuracy? A. Yes, it would.

Q. Such a high degree of accuracy available to firms not as fully automated as Walston & Co? A. It would depend on their records. It may be, but it couldn't be achieved as quickly.

Q. Or as cheaply perhaps? A. Or as cheaply, I would assume that.

Q. Would Walston have any difficulty in making available 15 hours of computer or machine time? A. Yes, we would.

Q. Why is that so? A. Well, we are in a period now implementing larger systems and at this time we couldn't afford to use that time for something other than the more or less research and development that we are doing to get ourselves out of a somewhat of a, you know, system that is kind of half second generation and half third generation computers.

Also operations uses a great deal of the time for their day-to-day business.

Q. If after receiving such a request and making such a search for one customer, another customer should ask you for similar information with regard to himself, would the process have to be repeated? A. Yes.

Q. How would the cost of such a job be handled? Would Walston absorb it? A. No, I don't think we could, of course not.

Q. Would you charge that back to the customer? A. We would have to.

Q. Or decline to perform the work without assurance of payment? A. Yes.

Q. This process, as you described it, I gather would not deliver to the customers his actual confirmation slips for the trades involved? A. No.

Q. It would simply inform him that there had been such trades as far as you knew? A. That is right.

Q. Since we raised this question with you, do you know whether the management of Walston & Co. has considered whether they would undertake the work of hunting for this kind of information if they were requested to do so? A. It has been considered.

Q. Have they decided? A. Yes, I would say pretty much.

Q. What was the decision? A. That we would decline to do anything like this.

Mr. Stanton: That is all. Thank you very much, Mr. Martin.

The Court: I take it you mean by that, Mr. Martin, that you would decline any customer who asked this save for some commitment on his part to pay reasonable costs?

The Witness: No, we would decline to do it regardless of the cost.

The Court: Could you enlighten us as to the reasons for that?

The Witness: This would be a special service for the particular client or clients at a time when costs are high and income is quite low. You would refrain from doing this. It is just something that we won't do unless we were forced to comply with something like this.

Mr. Stanton: Perhaps I should ask this.

By Mr. Stanton:

Q. Would this require changing of employees from their current functions to doing this? A. At this time, yes, it would.

Q. In how constant operation are these machines now? A. These machines run 24 hours a day close to seven days a week. On the weekend we are using them a great deal for testing and things of this sort, because we can't get the appropriate time during the week.

Mr. Stanton: Thank you.

The Court: Mr. Martin, I think I would like to ask you this question: If one were to assume that a customer would be willing to pay not only the total direct

cost for such a search, but as well the indirect or perhaps I might call them the overhead costs allocable to the job, would it be something that your management would still decline on the grounds that you just could not put yourself in a position to offer this service to one with the thought that this might lead to more—I am not putting this very well—but you see what I mean?

The Witness: In other words, setting a precedent.

The Court: You wouldn't want to set a precedent, I take it, from what you say?

The Witness: Yes, this is a good part of it also.

The Court: I gather also that you are saying that aside and apart from considerations of cost, the allocable time for usage of your computers is already so strained that absent a total new investment in other computers, you really couldn't handle it?

The Witness: That is true at this time.

The Court: All right.

Any other person at the back table who wishes to question him?

Mr. Jackson: No, your Honor.

The Court: Mr. Rosenfeld.

Mr. Rosenfeld: I have just a few questions, your Honor.

Cross-examination by Mr. Rosenfeld:

Q. Mr. Martin, you described a cost of $3,000. I did not understand, was that $3,000 per individual or $3,000 for a whole operation? A. That would be $3,000 for a pass

through that period, whether it was one individual or a group of individuals. Again it depends on the criteria with which the program is designed.

If we are told or it is determined that, say, one account number will be used and we made the pass, it would cost as much for one as it would, say, for a group.

Q. Cost as much for one as for what? A. As for a multiple accounts. There would be extra costs because of materials because we would derive more output from more than one.

Q. How much would it cost, if you could estimate to do this for all your customers? The $3,000, was that the sum total of costs for all your customers, if you did it in one operation? A. That would be the cost to make a complete pass through that particular period of magnetic tapes. There would be extra cost—there might be more cost if we were out putting, say, the data for more than one individual. In other words, if we went through this file for one person, it would have to cost, I feel, at least $3,000. If there were two customers, it would mean more paper to print on, the output, but the machine time would be approximately the same so, therefore, the cost for the machine, the use of the machine, would be the same for two as it would be for one.

Q. How many customers does Walston have, roughly? A. You are saying now if we did this for all our customers?

Q. Right. A. Oh, approximately 250 to 300,000 active customers. I would say something of that sort.

Q. Could you give us some kind of estimate of what the cost would be if you did this process for all your customers? A. The cost would be probably—well, let me put it this way: Each customer more or less subscribe to this pass that we are going to do, say, it would have to be key punched on a card or something of this sort to get his number and there would be data processing involved with that. If we start to go now to a greater number of customers,

I would have to figure out pretty much the card costs and this kind of thing. Say one pass would be very roughly say 4,500 or $5,000, something of this sort, because of the great amount of output. We are virtually almost printing a great part of that file now that we are passing against because the more customers naturally the more we are going to be extracting from there and printing, so there would be a tremendous amount of printed output and I would have to look at paper costs and this kind of thing to get an idea.

Q. Have you any idea what the time involved would be if you had to do a run for all your customers? A. No, I wouldn't. I would have to determine how much printed output there would be, and this is the slowest part of it, printing out all of this information.

Q. Would it be a very laborious task? A. I would say yes.

Q. You mentioned, Mr. Martin, that the process would be somewhat slower or slower for firms not as automated as Walston & Co. Are there firms not as automated as Walston & Co.? A. Yes.

Q. Do you know whether there are a significant number of firms not as automated as Walston & Co.? A. You are talking about the total number of brokerage firms?

Q. Yes, sir. A. A great deal are not as sophisticated as Walston & Co. But then again they offer special services. They are smaller firms, naturally they may not qualify for large-scale computers and things of this sort.

Q. Would you have any idea how firms less automated than Walston & Co. would go about this task of finding odd lot transactions? A. I would have to know how they maintained all these pass files, in what form, before I could determine how they might go about it.

Mr. Rosenfeld: That is all I have, your Honor.

The Court: All right.

Mr. Stanton: That is all we have, your Honor.

The Court: Thank you, Mr. Martin. You may be excused.

(Witness excused.)

Mr. Bensel: May it please the Court, my name is Mr. Bensel, I have requested Mr. Jeremiah Murphy, chief deputy clerk of this court, to appear here today and explain to the Court some of the problems that he and Mr. Livingston have encountered in dealing with problems incident to class suits. In the opinion of the Court of Appeals, Judge Medina stated, among other things, the defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of special masters, printing, postage and so on.

He also said in talking about identity of memorandums of the class and I quote, "Until it is answered how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate and what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?"

I would like to ask Mr. Murphy to take the stand and testify as to problems that they have encountered in connection with the current drug case.

The Court: All right.

I am not sure this is a typical experience for Mr. Murphy, we will have to ask him that.

JEREMIAH A. MURPHY, called as a witness, having been first duly sworn, testified as follows:

Mr. Bensel: Your Honor, for the Court's information and guidance I have here a copy of the order in the case of Alpine Pharmacy and other plaintiffs against Charles Pfizer, et al., No. 69 Civ. 559, and twelve other wholesaler-retailer actions now consolidated. This order is entitled "order directing Rule 23(C)(2) notice to certain class members (retailers and wholesalers)," and since this is a document on file in the officer [*sic*] here, I would suggest that we might, for the purpose of this witness's testimony, have it marked in evidence so that we are conscious of what problems they were dealing with.

Mr. Rosenfeld: I have no objection, your Honor, but I have never seen this.

Mr. Bensel: It is from the clerk's office.

The Court: That is one of the cases, is it not, before Judge Wyatt?

Mr. Bensel: That is correct, your Honor.

(Defendant's Exhibit C received in evidence.)

Mr. Bensel: This order, which has now been marked Exhibit C, your Honor, provides for a form of notice attached as Exhibit A to be directed to the members of the consolidated wholesaler-retailer class, as defined in a prior order of Judge Wyatt.

The order further directs that individual notice be sent to that group. I don't have available the actual number of members of that class although the information that we had from counsel involved indicates that there were some 40,000 in that retailer-wholesaler group.

The Court: It seems to me I recall in the releases which are sent out officially by the multidistrict litigation panel that something in the neighborhood of that number was recited in its discussion of this particular case; that there were approximately 40,000.

Mr. Bensel: That is my understanding and it could be, I think, ascertained if somebody were to count the names appearing on the proof of mailing, but we haven't actually done that.

I have also and I would like to offer two of the notices that were published in connection with the Pfizer case.

(Defendant's Exhibits D and E received in evidence.)

Direct examination by Mr. Bensel:

Q. Mr. Murphy, I think the record shows your position here. You are the chief deputy clerk of the United States District Court, Southern District of New York? A. That is correct.

Q. You have heard these brief comments of mine in connection with the so-called drug litigation? A. Yes, I have.

Q. I have had marked here as Exhibit C certified copy of the order directing notice to certain members of the class there involved and as Exhibits D and E notices that were sent out to consumers of certain broad spectrum antibiotics, as well as a notice of a proposed compromise to consumers of certain broad spectrum antibiotics.

Could you state to the Court, as a result of the notices that went out to members of the class in the drug case, both individual notice and published notice, the experience of the clerk's office in this court in respect to the responses

or calls relating to those notices? A. Well, all during last summer after these notices went out—

Q. Keep your voice up. A. At its inception when these notices went out some time in June, or various papers in these cases, not only notices, we received an ever increasing number of phone calls directed to the clerk primarily because I believe the notices were in his name in a lot of these instances or they said file claims in mail boxes and so forth, post office boxes that were in the name of the clerk, and there were all these letter inquiries by people asking to explain what the notices meant, how long it would take to get paid, of every conceivable nature from all over the country.

Of course, we only have a few lines there—

Q. A few lines in the clerk's office? A. Right, and we would suggest that as it had been arranged with the various firms of attorneys, we would turn them over and request that they get in touch with the attorneys as to the status of the preceeding as we had been instructed to do, but many times people were adamant about speaking to the man who had signed the notice, not knowing that he didn't know the up-to-the-minute status of the case, and so forth.

That was one of the things that tied us up quite a bit last summer.

Q. You say you had a number of calls? A. Yes.

Q. Over how long a period would you say was the bulk of those calls being received and can you give us any idea of how many of them? A. Well, in July and August when I was there it seemed it was continuous all day long and we would answer the phone and then we would have to dig out the addresses who to route these calls to and so forth, and the different firms, ask what status they were in, or what class they were in, and some of them even asked what exclusion meant.

Q. Exclusion? A. Yes, a word like "exclusion" and so forth. What were their rights, when would they get paid.

As I recall, my actual experience, this is what happened.

Many of the claims were sent directly to the court house instead of to the mail boxes that were assigned to each state. There was a mail pouch or box for each state because of certain classes. They would come in registered mail to the clerk, we had a girl listing these sometimes for a few hours at a time just acknowledging receipt of these and putting them in our book.

Q. Would you like to route them out? A. We would have to route them to the various firms, like the attorneys for plaintiff and so forth, who would reroute them.

Even up until this day we get quite a few inquiries. For example, the mail strike, the Judge had set a big hearing on March 24, I believe, and these fellows would get on the phone, say we can't write, we want to be heard, we have to have our notice in that we want to be heard, will you make a record of it. Some fellow called from Kalamazoo, Michigan, "I have emphysema, I don't know if I can get in. Will you take my name and address." And stuff like that. It is just of every type and nature.

Q. Do you remember telling me of a recent call you had collect from Alaska? A. That was in another case. You know we always have three or four of these cases going at one time, or five. Some stockholders actions and some are class actions and this woman called collect, Mr. Livingston got the call, and she wanted to know what "exclusion" meant. What if she agreed to be excluded, what would it mean, and so forth.

First of all, he said we can't take the call collect and then she called up and paid for it.

Q. Have you had inquiries from other invidnals in connection with these notices that went out? A. We have

had many. Congressmen would write in and want to know why their constituents hadn't been paid. We would route it to the law firm who would like to wait until there was a hearing to clear the air a little so they could tell him something definitive and then he would write and say, please have the courtesy of answering me, to the clerk again, as it was kind of agonizing in itself.

Of course, we did the best we could with the help we had. It was a little slow, but it had an impact on them.

Q. When you received letter communications from so-called members of this class, do I understand that somebody in the office, the clerk's office, has to make an entry of the receipt of the letter and the disposition of it? A. Well, if it is a registered letter we always make a record of it.

Q. During the height of the calls and mail on the drug case last summer, was there one or more persons in the clerk's office devoting full time to handling that mail and those phone calls? A. Well, it was divided up among a receptionist, a secretary, myself or Mr. Livingston, and if one of the pieces of mail was a little intricate, we would look at it and try to determine or we would call up the attorneys and say we would have to give this a little priority because there may be a time element, or something involved, but we couldn't answer on it. We weren't that familiar with it.

Mr. Bensel: That is all, Mr. Murphy. Thank you.

The Court: Mr. Rosenfeld?

Mr. Rosenfeld: I have no questions, your Honor. I do want to say that I have not seen Exhibits C, D and E. While I don't expect I would have anything to ask when I do see them—

The Court: Mr. Bensel, I am sure—

Mr. Bensel: I will gladly give you copies of them. If you want to borrow these now, you can take them.

The Court: He wants to look at them now.

Mr. Bensel: They are very short.

Mr. Rosenfeld: I have no questions, your Honor, except I would ask Mr. Bensel to send me a copy of these at his convenience.

The Court: Yes, fair enough.

Let me ask you something, Mr. Bensel, are we to understand that these are photocopies or are these actually the court file copies?

Mr. Bensel: Photocopies of the court papers. The stamp is on them.

The Court: Fine. Then presumably some time ago—

Mr. Bensel: What I would suggest doing, if I may, is I will have copies made of these and I will send these actual exhibits back to your Honor, and I will give a copy of them to Mr. Rosenfeld.

The Court: Very nice. Thank you, Mr. Jerry Murphy, you may step down.

(Witness excused.)

The Court: I take it from what Mr. Milburn said earlier that Messrs. Murphy and Martin were the only two witnesses that you wished to present.

Mr. Bensel: That is correct.

The Court: Are we in a position where we can agree that there is no more evidence, if you will, that either the plaintiff or the defense wants to bring to bear?

Mr. Rosenfeld: I have none, your Honor.

Mr. Stanton: I think that is right, your Honor.

The Court: There is one thing I am a little embarrassed to raise, but I think it must be confronted particularly since in rereading the majority opinion in the Court of Appeals they talk a great deal about it, and indeed I am afraid I talk about it a little in that memorandum of mine that I wrote, lo, so many years ago, and that is this: I suppose it is relevant to ask you, Mr. Rosenfeld, since you are new to the case, whether it wouldn't be wise if you were to submit an affidavit here some time soon, setting forth your experience and sterling qualities without any bashfulness on your part, because from time immemorial, although this has been criticized by certain courts, those very courts that criticize it then rely on it later to make a decision, namely, the competence, experience, knowhow or whatever of counsel for the plaintiff who is seeking to represent the putative class.

Now, perhaps all your friends at the back table know you well. I am sorry to say that I do not know you except from our previous hearings, which we didn't get into your sterling qualities, which I am sure are numerous, but do you see what I am trying to say?

Mr. Rosenfeld: I do, your Honor. I will prepare such an affidavit.

The Court: I notice that Judge Medina and Judge Lumbard in their opinions both dwell on this, and though I am afraid, though I haven't dared read it, the opinion of Tyler, J. dwells in some aspects of this, perhaps, I don't know.

It might be beneficial to you in case the defendants seek to urge that you are a Johnnie-come-lately with

no real experience, and so on. Embarrassing as this is, I think we have got to have something in the record on it.

Mr. Rosenfeld: I appreciate that, your Honor.

The Court: All right, now, gentlemen, what is your pleasure? I am reading with some dismay that the Court of Appeals in its opinion said, and the case is remanded for a prompt and expeditious evidentiary hearing, which I am sure they meant in utmost good faith.

Of course, all of us know pretty well the history of this great affair since that opinion was written and I thing it is perfectly fair to say that it is nobody's fault that we are here today on April 30, 1970, having our evidentiary hearing.

In other words, an awful lot happened that certainly was not known or contemplated by the Court of Appeals and indeed, even by counsel, or the District Court, but I think we have got to see if we can't complete this.

I would like some briefs from you. I hope you don't mind my saying that.

Mr. Bensel: We would be happy to submit them. In fact, we desire to submit them.

The Court: Can we agree on a schedule. I think that is about all we can do today, isn't it?

Mr. Bensel: That is correct.

Mr. Stanton: Your Honor, independently I might perhaps suggest one alternative. I haven't even dared to raise with co-counsel because of its temerity, it might be of assistance to you if instead of submitting a brief on the law, with which we believe your Honor is well

familiar, we proposed findings of fact and conclusions of law.

The Court: That I think is an excellent idea from my point of view, and in fact I was just about to suggest that if I were left to my own devices, that is what I would prefer.

I do note that the Court of Appeals,—I had forgotten this—seems to think that I didn't quite understand the law, but after saying that, they seem to go off on other things and besides, I think so much time has gone by and so many cases have been written with which I am quite sure every one of us are pretty familiar, I frankly would prefer that.

Mr. Rosenfeld: Your Honor, I don't think that there is much dispute as to the facts. Witness the fact that stipulations were easily signed, and that the testimony today is not testimony that I challenge by cross-examination.

In my view of the case, the facts are less controversial than the law, and I was anticipating asking your Honor for something like four weeks in which each side could perhaps exchange briefs because I think from my point of view the main issue here is legal, not factual. I don't think there is a factual issue here.

The Court: Perhaps in this sense I, at least, would agree with you: The evidentiary facts I don't think from all I have seen and heard from all of you are very much in dispute. As you say, witness the stipulation.

You were nice enough not to indicate this afternoon that you doubted the veracity of our witnesses and so on and so on. I think, however, there are some ultimate

facts, if I may put it that way, or there are mixed questions of fact and law, that is where the difference lies.

Mr. Rosenfeld: I don't want to quarrel with your Honor, but I think even on the ultimate facts, I doubt that there is a dispute. I don't think there is a dispute.

The Court: We have some difficulty, it seems to me, because if you take the opinions now in this case and I exclude what I call Eisen 1, which dealt with a different issue, but if you take the District Court opinion, the opinion of the majority in Eisen 2, and the opinion of the dissenter in Eisen 2, it seems to me it is fair to say that you have got four Judges who have somewhat differing views of where the facts leave one.

Now, that in large measure is probably, as you say, a question of law.

Mr. Rosenfeld: Right, your Honor.

The Court: But let's be blunt about it. Questions of law turn so heavily on facts, particularly ultimate facts, that I would like to ask you to consider that we adopt Mr. Stanton's suggestion and that we do have proposed findings and conclusions.

I do not think that this means, however, that if you would like to write a brief as well—

Mr. Rosenfeld: I would, your Honor.

The Court: I would have no objection whatsoever. I would welcome it. But I won't insist on it. In other words, what I would like to do is get both sides to submit proposed findings and conclusions. Then I would be happy, but if any counsel wishes to add a brief or memorandum or whatever he wishes to call it, on the law or on how to apply the law here, I would be very grateful and receive it with alacrity.

How is that?

Mr. Rosenfeld: It might be, your Honor, I don't know, I am just hazarding a guess, it might be that the parties could agree on these proposed findings of fact. It might be, because they really agreed on the second stipulation in one minute and so I don't know if your Honor would be receiving what I think is the issue in this case—

The Court: Let me put it this way, Mr. Rosenfeld. I don't mean to quarrel with you because I don't disagree very violently with anything you have said, but just one further observation and then I will be quiet.

To illustrate, I think it is fair to say that in my original opinion I felt most strongly on two questions: One, unmanageability, if you will, and two, concern about adequate notice within any reasonable realm of expense.

Isn't that a pretty fair observation from what you recall of the District Court opinion?

Mr. Rosenfeld: That was the same problem, your Honor, that the Second Circuit raised.

The Court: At least the dissent felt that way, too, and agreed with me on that.

Now, I can see a number of strands of fact, which you have already agreed to, quite fairly and commendably here, pointing to both of these points. I can see some which point to only one point, and so on.

I can see differences among counsel and reasonable differences, where do these facts go and where do they pigeonhole, one, the other or both.

For that reason, for example, it seems to me it would be useful to me to see proposed findings as well as proposed conclusions, but in any case I am

happy to have a brief as well, and you have been good enough to say you want to furnish one, and I will take it with pleasure, and perhaps with considerable edification.

Gentlemen, the real question is what do you think of Mr. Rosenfeld's suggestion of four weeks?

Mr. Rosenfeld: I think I could have a brief ready perhaps to exchange within four weeks, if the other side doesn't want to put in a brief, I guess they don't have to, but I would very much want to do it.

The Court: They heard you.

Mr. Bensel: I think we can meet that schedule.

Mr. Rosenfeld: We could be flexible if something happens. We could always impose on the Court for a few more days, but I would like to have the brief in say four weeks from now, if I could.

Mr. Bensel: Mr. Rosenfeld, when you talk about briefs, you are also talking about proposed findings?

The Court: The fourth week from now is Memorial Day or at least it is the 29th, it has big red numbers here, which means a Federal holiday.

Mr. Bensel: Mr. Stanton has a very heavy schedule. He may want to enlarge on that request for time.

Mr. Rosenfeld: I would agree to that.

The Court: What is your idea?

Mr. Stanton: For purely personal engagements towards the end of next month, June 15 would be a great deal better for me. I don't offer that with any—

The Court: The trouble is, why don't we do this: Would anybody object if we sort of settle in a little short of June 15, specifically June 10. That has a nice round ring to it.

Mr. Stanton: All right, sir.

The Court: Is that all right, Mr. Rosenfeld?

Mr. Rosenfeld: Certainly, your Honor.

The Court: The idea is that you all will file your papers now.

Mr. Rosenfeld: We will exchange papers and perhaps people might want to be allowed say, ten days to respond to the other person's papers.

The Court: If anybody wants to respond to anything, I think the thing to do is to call my chambers and we will work it out.

Frankly, I don't see any useful purpose in argument, but if anybody feels strongly about being heard in the flesh or orally, please feel free to either drop me a note or call up my chambers and say your preference, and I will respond one way or the other.

Very good, I think that covers everything for the nonce, and then we will hope that—I will be perfectly blunt about it, I am going to be here all through July, but I do hope to go on vacation some time in August, and if possible I would like to see us look to having a resolution from the District Court prior to my departing on vacation. I think it would be useful to everybody concerned if we shot for that result.

Mr. Rosenfeld: Thank you, your Honor.

The Court: Nice to see you all, and I will be in touch toward June 10, in other words.

OPINION OF TYLER, J., DATED OCTOBER 8, 1970, WHEREBY COURT IS UNABLE AT THIS TIME TO DECIDE CLASS ACTION MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This court originally determined that this case was not an appropriate class action under Rule 23 of the Federal Rules of Civil Procedure. *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147 (S. D. N. Y. 1966). That decision was reversed by the Court of Appeals and remanded for further consideration of factors governing the propriety of a class action. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968). Pursuant to the Court of Appeals opinion and after a long delay having no relevance to the issues,[1] discovery, conferences and hearings have been conducted to develop the information needed for reconsideration and decision. Upon consideration and reconsideration of all of the materials presented to the court, however, I am reluctantly constrained to say that certain missing pieces of information have yet to be supplied before the class action picture is complete. Put differently, I am unable to conceive of a solution of this extraordinary issue upon the present record which does not work a clear injustice upon one or the other of the parties; we have not yet clearly avoided the problem described by the appellate court in the following language:

1. Plaintiff's original attorneys were obliged to withdraw from the case because of a conflict of interest; many months elapsed before new counsel was substituted.

"In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted." *Eisen v. Carlisle & Jacquelin,* 391 F. 2d 555, 570 (2d Cir. 1968).

Admittedly, some of the determinations necessary for the class action decision can be resolved with the information since provided by the parties, largely in the form of two stipulations. Nevertheless, the crucial issues of manageability and notice remain little more than questions; further facts not within the knowledge of the undersigned must, if possible, be gleaned with further efforts and assistance of counsel.

I.

Before the question of manageability can be resolved, certain mechanical problems of administration of this class action must be addressed. For example, will the appointment of a special master be required, and if so, what fee will be required? In processing claims, how much paper work, printing and postage is likely to be required and at what expense? What procedures should be used for intervention by other class members? What procedures should be adopted for individual class members to file claims and, more importantly, to prove the claims? Obviously, any expense figures will have to be estimates, and these estimates may be based on the experience of other courts in other cases, but figures should be related to the realities

of the present case insofar as is practicable, with full understanding that others not here mentioned may occur to astute counsel.

Also directly related to the manageability issue, the court must be assured that damages can in fact be computed if liability should be determined. Is it possible to fashion a formula for determining damages which will be applicable to the entire class as a single entity, or to appropriate subclasses as entities? If such a formula is not possible, will it be feasible to compute damages on the basis of claims filed by individual class members; approximately how many claims will have to be filed in order for such a procedure to be financially practicable?

If damages are to be determined on the basis of individual claims filed, the sending of some form of notice to the class must be assumed. Thus, the cost of such notices will have to be considered in determining how large a response will be required before the procedure will be financially practicable.

The court has considered plaintiff's proposed formula for distribution of any recovery which might result from the action. With a bow to the ingenuity of plaintiff's counsel and without commenting on the merits of the proposal, this action has not yet reached that stage. Before methods of distribution of damages can be considered, the court must first, and at this early stage, be certain that such a sum or sums may be fairly and accurately computed in the first place. Thus, the parties should address themselves to this question in detail.

II.

The second major issue remaining in the class action determination is that of notice. Counsel, of course, have

already discussed the question of notice, but there are still some details which should be filled in. If individual notice is to be sent only to those class members "who may possess enough of a stake in the proceedings to justify personal intervention", *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 569 (2d Cir. 1968),[2] how may those persons be identified and what is an appropriate cut-off point among the approximately 2,000,000 identifiable members for determining who will receive individual notice and who will not? What would be the approximate cost of various size advertisements in newspapers of national distribution? With reference to plaintiff's proposal for an enclosure in the periodic statements of brokerage houses to their customers and taking into account the probable size of an appropriate notice, what would be the cost to individual brokerage houses of printing and inserting such an enclosure? Specifically what "obligations", if any, do the New York Stock Exchange and member firms have to customers which would justify the use of such a procedure?

In summary, this court is unable to decide upon the present record the class action motion at this time, and this memorandum should in no way be construed as even a tentative view on the merits of that question. Further information from the parties will be required so that all possible aspects of the class action may be examined and determined. Accordingly, counsel are directed to appear at a conference in Room 2704 on October 16, 1970 at 1200

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2. As I see it, the problem of notice is infinitely compounded in this case by the Rule provision that members desiring to "opt out" must reply in writing to that end. Rule 23(c)(2), F. R. Civ. P. Given (1) the mass of mail solicitations in the United States and (2) the known habit of the citizenry to "toss" such mail, one can be fairly certain that most specific individual notice will furnish little information concerning what members are truly concerned with the issues in this litigation.

Noon in order to discuss the matters set forth above and any other items they deem pertinent to the class action determination. It is so ordered.

Dated: New York, N. Y.
October 8, 1970.

H. R. Tyler, Jr.
U. S. D. J.

AFFIDAVIT OF RUSSELL E. BROOKS IN RESPONSE TO OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

RUSSELL E. BROOKS, being duly sworn, says:

1. I am an attorney associated with the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange. I make this affidavit in response to the opinion and order of the Court filed October 9, 1970 requesting further information on the question of whether this action is to be maintained as a class action.

2. American Direct Mail Co., Inc., 350 Hudson Street, New York, N. Y., is in the business of preparing and mailing written communications to meet the needs of its clients, among which is The Association of the Bar of the City of New York.

3. I have been advised by William Holtz of American Direct Mail Co., Inc. that its charge for stuffing a single page printed notice and mailing it with first class domestic postage would be 10¢ per letter (including the postage). Mr. Holtz advised that this price would apply regardless of the number of letters to be sent.

RUSSELL E. BROOKS

(Sworn to January 11, 1971.)

AFFIDAVIT OF RICHARD ALLAN IN RESPONSE TO OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

RICHARD ALLAN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Kelley Drye Warren Clark Carr & Ellis, counsel for the defendant Decoppet & Doremus. I am fully familiar with the proceedings in the above-captioned matter.

2. On the 23rd day of December 1970, pursuant to an appointment arranged by Mordecai Rosenfeld, attorney for the plaintiff herein, your deponent and an associate of this firm spent the entire business day with Arthur J. Galligan at the law office of Dickstein Shapiro Dennis Silver & Galligan, attorneys for 20 states, the District of Columbia and the cities of New York and Memphis in the "Drug Cases", *State of West Virginia v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. N. Y.). We examined a random sampling of the responses received by Mr. Galligan's office pursuant to the Rule 23(c)(2) notice ordered by the Court and the subsequent sets of correspondence sent by the Dickstein firm. In addition, Mr. Galligan and I discussed, at great length, the procedure and problems encountered by his office in the Drug Cases.

3. The notice in the Drug Cases ordered by the Court, informing consumer purchasers of broad spectrum anti-

biotics products of their right to file claims or opt out of the suit, was published in every English and Spanish language newspapers of general circulation in the United States. Mr. Galligan in his affidavit of December 8, 1970, submitted by plaintiff's counsel states that approximately 42,000 individual responses were received and processed by his firm. However, Mr. Galligan informed me that 50% of the 42,000 responses received did not contain sufficient information to be accepted and required follow-up correspondence by his office seeking additional information and clarification of the information sent. It appeared to your deponent from our examination of these responses that from 10 to 15 percent of those persons, who were required to answer Mr. Galligan's inquiry, failed a second time to provide sufficiently adequate responses and this necessitated additional correspondence by Mr. Galligan's office.

4. From our examination it also appears that approximately 80% of the claim letters received indicated that the writer was only able to provide an approximate cost of the broad spectrum antibiotics purchased for the following reasons: (1) they had no records of the drugs purchased (2) their druggist refused to supply the information (3) the drug store, from whom they normally purchased their drugs, had ceased doing business (4) their doctor could not or would not supply them with the information.

5. There were many claim letters in Mr. Galligan's files that requested additional information or provided totally inadequate responses that did not have attached any subsequent correspondence either answering the inquiry or seeking the necessary further information.

6. During the months immediately subsequent to the publication of the Rule 23(c)(2) notice, Mr. Galligan informed me that he received several hundred telephone calls

from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related questions. [See Also in this regard: New York Times, December 11, 1970, *A Class Action Raises an Issue*, Metz, Exhibit I attached hereto]. He also informed me that several thousand telephone calls were received by his office, but these were handled by "bright, intelligent people" who had been "trained to respond" by Mr. Galligan. Mr. Galligan informed your deponent that for the last few years he has devoted his total time to the Drug Cases.

7. Mr. Galligan informed your deponent that it was his belief, based upon his extensive research and experience in the Drug Cases, and his knowledge of the facts in the instant matter, that the minimum notice that would be necessary to fulfill the constitutional requirement of Rule 23(c)(2) and, in addition, be the best notice practicable in the instant litigation would be the "bulk" mailing of notices to identifiable purchasers or sellers of odd-lot shares and publication in substantially the same number of newspapers as required in the Drug Cases. He would not comment on the number of times it would be necessary to publish a Rule 23(c)(2) notice for it was clearly obvious, upon examination of his files, that a substantial number of those persons who filed claims had learned of the drug suit and the necessity of filing a claim by reason of announcements on radio, television, publicity by local public officials and claim forms published in local newspapers.

ADVERTISING COSTS

8. Pursuant to a telephone conversation with Arnold Berman of Compton Advertising, Inc., 625 Madison Avenue,

New York, New York, the attached letter and rate sheet (Exhibit I A and B) were submitted to your deponent as an example of the cost of publication for one (1) black and white "notice" to be published in the regular news section of the major circulating newspapers in the following cities: New York, San Francisco, Los Angeles, Chicago, London, Paris and Rome. The national edition of the Wall Street Journal is equivalent in circulation to the total circulation of the Journal's eastern, mid-western, pacific and south-western editions. As appears from page 2 paragraph 3(a) of the affidavit of J. Paul McGrath dated August 20, 1970, submitted by the plaintiff's counsel, the cost of publishing the Rule 23(c)(2) notice (Exhibit II F, herein) in the Drug Cases was $129,848.29.

PRINTING COSTS

9. (a) Pursuant to a conversation with Richard B. Tyrrel of Benj. H. Tyrrel, a printing company located at 110 Greenwich Street, New York, New York, the attached printing estimate (Exhibit II and II A, B, C, D, E, F) was submitted to your deponent.

9. (b) The printing cost, as outlined in Exhibit II, for 2 million copies of a notice to be mailed to purchasers and sellers of odd-lot shares are based upon (a) a notice proposed by the attorney for the plaintiff (Exhibit II A); (b) a verified claim form proposed by the attorneys for the defendants (Exhibit II B); (c) a notice to all purchasers and sellers of odd-lots proposed by attorneys for the defendants (Exhibit II C); (d) the notice to all wholesalers and retailers and the verified proof of claim form ordered and mailed by the Court in the "Drug Cases" (Exhibit II D); (e) the published notice, ordered by the Court, of the proposed compromise in the "Drug Cases" (Exhibit II E); (f) the published notice to consumers, ordered by the Court

in the "Drug Cases", advising the consumer of his opportunity to opt in or out, his opportunity to file a notice of claim and setting for the information required to be filed (Exhibit II F); the use of 9 point type for all notices, printing to be done on both sides of each printed page and each page to be folded and ready for insertion and mailing.

9. (c) The cost of printing 2 million copies of each type of notice is as follows:

Exhibit II A	the notice to all purchasers and sellers of odd-lots proposed by the attorney for the plaintiff	$ 9,350
Exhibit II B	vertified claim form proposed by the attorneys for the defendants	$ 9,400
Exhibit II C	notice to all purchasers and sellers of odd-lots proposed by the attorneys for the defendants	$ 9,375
Exhibit II D	the notice to all wholesalers and retailers and the verified proof of claim form ordered to be mailed by the Court in the "Drug Cases"	$22,425
Exhibit II E	published notice of the proposed compromise to consumers, ordered by the Court, in the "Drug Cases"	$ 9,425
Exhibit II F	published notice to consumers, in the "Drug Cases", affording them the opportunity to opt in or out, file a notice of claim and setting forth the information required to be filed as ordered by the Court	$ 9,425

RICHARD ALLAN

(Sworn to January 11, 1971.)
(Exhibits omitted.)

AFFIDAVIT OF MORDECAI ROSENFELD IN RESPONSE TO OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am the attorney for the plaintiff in the above case. I am submitting this affidavit in response to the Court's opinion dated October 8, 1970 requesting, among other things, the cost of publishing a Rule 23 notice.

An advertising manager at the Wall Street Journal estimated that it would cost about $950 to publish the notice suggested by plaintiff (Reply Br., p. 27; annexed hereto for convenience) as a legal notice in the national edition of the Wall Street Journal. The national edition includes the Eastern, Midwest, Pacific Coast and Southwest Editions. A single publication in the Eastern edition would cost, he estimated, about $300. The figures he gave were both estimates; a final price could not be given until the notice is actually set in type.

Mordecai Rosenfeld

(Sworn to January 8, 1971.)
(Exhibit omitted.)

AFFIDAVIT OF ARTHUR J. GALLIGAN IN RESPONSE TO OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

Arthur J. Galligan, being duly sworn, deposes and says:

I am a member of the law firm of Dickstein, Shapiro & Galligan, attorneys for twenty states, the District of Columbia, and the cities of New York and Memphis in the *Drug Cases, State of West Virgina v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. of N. Y.). I am personally familiar with the way the consumer class action aspect of the *Drug Cases* has been maintained.

The class action aspect of the *Drug Cases* concerns a recovery made on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. While there is no precise way of fixing the size of that class, it has been estimated that the class includes some 150 million persons, located in every state of the Union (except the seven states that opted-out) and Puerto Rico. I am submitting this affidavit to set forth the costs and mechanics of maintaining the *Drug Cases* consumer class action.

I. The Background

Defendants had agreed to settle the *Drug Cases* for a total of $100 million; $37 million of that was allocated to the class of individual consumers. It was agreed, too, that

defendants would advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved. A description of those expenses follows:

The total expense of maintaining and settling the *Drug Cases* consumer class action will be, basically, about $285,000. Those expenses can be divided into three categories: (1) The expenses of the Rule 23(c)(2) notice (the notice providing for filing of claims and opting-out); (2) the expenses of the Rule 23(e) notice (the notice of the settlement hearing); and (3) the expenses of handling and processing the claims submitted by individual members of the consumer class. The detail of each expense item is included in the affidavit of J. Paul McGrath, submitted in the *Drug Cases* and annexed hereto as Exh. A.

II. The Rule 23(c)(2) Notice

A notice pursuant to Federal Rule 23(c)(2), informing class members of their right to file claims or opt-out of the class, was published in every English and Spanish language newspaper of general circulation published in the United States (a copy of the notice is annexed as Exh. B); the total cost was $129,848 (see Exh. A, p. 2, ¶3(a)). It should be noted that in response to that Rule 23(c)(2) advertisement 42 individual consumers served notices opting-out (Opinion of Judge Wyatt dated June 24, 1970 (Opinion No. 36,901) at p. 37).

III. The Rule 23(e) Notice

Following publication of the Rule 23(c)(2) notices, a notice of the settlement hearing was published pursuant to Rule 23(e). The Rule 23(e) notice was published, by order of the court, in the two newspapers of largest circula-

tion in each state. The total costs of that publication was $29,984 (see Exh. A, p. 3, ¶3(b)). In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Those expenses were: $1,943 for printing envelopes; $6,300 for the preparation of the consumer class mailing list; and $7,141 for duplicating and mailing the notice to members of the consumer class. In addition, approximately $8,535 of general expenses (cost of post-office boxes and the expenses of an escrow agreement) have been allocated to the consumer class. (See Exh. A, p. 5, ¶5.) The total expense to the consumer class for the Rule 23(e) notice and miscellaneous expenses was thus about $53,000.

III. [*sic*] *Processing the Claims*

The third category of expense concerns the expense of processing the claims filed by individual consumers. As of August, 1970 we had received $65,000 for processing consumer claims; my estimate is that the total expense will be about $100,000.

Some 42,000 individual claims, representing total drug purchases of approximately $17 million, have been filed; they have all been processed by my law firm. We have established our own filing system, which we keep in our office. In order to facilitate the processing of claims, we have devised a refund form (annexed as Exh. C) and a form for responding to claimants (annexed as Exh. D). At any rate, since we've done all the work ourselves (although, of course, we've hired extra personnel) no special master has yet been appointed, or been found necessary.

As for paying the claims of the individual claimants, we are recommending to the Court that each claimant be paid the same fixed percentage of his total drug purchases. In reviewing the claims, we have established three categories: Category A contains those claims we are recommending be

paid in full; Category B contains those claims we are recommending be disapproved; Category C includes those claims we are recommending be approved in part. In order to make sure that the claims are valid, we are reviewing each claim where the total purchases exceed $1,000; and we are spot checking all the others.

Arthur J. Galligan

(Sworn to December 8, 1970.)

(Exhibits omitted.)

AFFIDAVIT OF MORDECAI ROSENFELD IN RESPONSE TO OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am the attorney for plaintiff. I am submitting this affidavit, which outlines my qualifications, pursuant to the Court's request.

Academically, I was graduated from Brown University magna cum laude in 1951; I was elected to the Phi Beta Kappa in my junior year; and I was a James Manning Scholar and a Francis Wayland Scholar (both for academic achievements). I was graduated from Yale Law School in 1954; while class standing was not precisely determined, I believe I was in the top quarter of my class.

From February, 1955 until June, 1957 I was associated with Messrs. Pomerantz Levy & Haudek. While there, I worked on a great variety of class and derivative actions, including the landmark case of *Perlman v. Feldman* (see 154 F. Supp. 436).

From the Fall of 1957 until the Spring of 1960 I was a trial attorney in the Rates Division of the Civil Aeronautics Board. My duties there consisted of representing the Government in cases establishing rates of return for the so-called local service air carriers and fixing, in each instance, the proper rate base and allowable expense items.

This was done both informally with the carriers and in formal contested hearings.

From 1960 to the present I have been in private practice on my own (first as a member of Rosenfeld & Silverman, but since 1964 as a single practitioner) specializing in derivative and class actions. I hope it doesn't sound boastful, but I have actively participated in scores of derivative and class actions; the recoveries have totaled tens of millions of dollars. While I do not wish to give a catalogue of cases, I have briefed and/or argued many well known litigations. See, for instance, *Brown v. Bullock*, 294 F. 2d 415; *Glicken v. Bradford*, 35 F. R. D. 144; *Saminsky v. Abbott*, 185 A. 2d 765; and *Feder v. Martin Marietta*, 406 F. 2d 260. Many of the earlier litigations I was involved with concerned the mutual fund industry. I have had two articles published on those cases (*The New Republic*, July 2, 1966 and January 7, 1967). I am taking the liberty of annexing a photostat of the 1966 article; it has been included in a recent book anthology. Finally, I served as a volunteer attorney for the Civil Liberties Union and reversed a contempt of court conviction based on the assertion of the Fifth Amendment. *Chandler v. U. S.*, 380 F. 2d 993.

I respectfully submit that I am qualified to represent the plaintiff and the class on whose behalf this action was brought.

Mordecai Rosenfeld

(Sworn to May 7, 1970.)
(Exhibit omitted.)

STIPULATION NUMBER 1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The undersigned, acting pursuant to their agreements made before this Court, hereby stipulate that, for the purposes of this action only and subject to all pertinent objections as to admissibility and relevance the following statements are true:

(1) During the period from May, 1962 through June, 1966, approximately 21,000,000 public individuals, institutions and intermediaries, (hereinafter collectively referred to as "shareholders") as defined herein, bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly-held. During the period from May, 1962 through June, 1968, approximately 23,000,000 shareholders bought and/or sold shares of stock of the aforesaid corporations.

(a) The term "public individuals" means individuals who are neither members of the New York Stock Exchange (hereinafter "NYSE") nor partners nor stockholders in a member organization of the NYSE. It includes individuals transacting business through a joint account with other individuals, or as custodians for minors, but does not include individuals whose transactions are processed through an intermediary such as a bank or non-member broker/dealer.

(b) The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-

bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

(c) The term "intermediaries" means non-members of the NYSE through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies, and non-member broker/dealers, who place orders which are processed in an account or accounts in the name of the intermediary.

2. As of June 30, 1966, approximately 13,300,000 shareholders owned shares of stock of the more than 1,600 corporations listed on the NYSE. As of June 30, 1968 approximately 14,550,000 shareholders owned shares of stock of the aforesaid corporations listed on the NYSE.

3. Approximately 6,000,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1966 in stocks listed on the NYSE. Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The figure of 6,600,000 shareholders who had odd-lot transactions for the period May, 1962 through June, 1968 includes the aforesaid figure of 6,000,000 persons who had odd-lot transactions during the period May, 1962 through June, 1966. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5% a year, or a total of 600,000 persons. The same approximate rate of growth in the number of odd-lot users is believed to have continued since June, 1968. The rate of increase in the number of shareholders having odd-lot transactions is based on the rate of increase in the number of shareholders who own stock on the NYSE.

(a) During the period May, 1962 through June, 1966 the average shareholder who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at $50.84 per share. The average odd-lot differential per transaction during such period was approximately $5.18.

(b) During the period May, 1962 through June, 1968 the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at $51.07 per share. The average odd-lot differential during such period was approximately $5.04.

4. The type of odd-lot transaction order (i.e., a "limit" order, a "day" order, a "market" order, an "open" order, a "stop loss" a "stop limit" order or some combination of these instructions) by the customer does not appear and is not required to appear on confirmations of purchases or sales of odd-lots of NYSE listed stocks furnished by NYSE members to their customers.

5. (a) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of at least one-third, i.e., 2,000,000 can be identified as follows: Fourteen of the largest brokerage firms * (hereinafter

* These fourteen firms are Merrill Lynch, Pierce, Fenner & Smith Incorporated; Bache & Co. Incorporated; Francis I. duPont & Co.; Loeb, Rhodes & Co., Dean Witter & Co. Incorporated; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Incorporated; Shearson, Hammill & Co. Incorporated; Paine, Webber, Jackson & Curtis; Hayden, Stone Incorporated; Reynolds & Co.; E. F. Hutton & Company Inc.; Dominick & Dominick, Incorporated.

"wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jackquelin [*sic*] or De Coppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56% of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated. Such names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders. Defendants cannot guarantee that the court will issue such process.

(b) Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number (say from 1,000 to 5,000) of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available (as well as the number of odd-lot transactions executed for each such account number. The names and addresses represented by these account numbers can be made available to Plaintiff with court process under an appropriate order or orders. Dependants [*sic*] cannot guarantee that the court will issue such process.

(c) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of

the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

6. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6% reside in foreign countries. In some foreign countries, such as France (until 1967) and Switzerland, public individuals and institutions may not place orders with members of the NYSE but instead are required by local laws to place such orders with intermediaries, as defined in paragraph 1(c).

(a) The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table marked Exhibit A.

7. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000, or more, public individuals had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE through the Monthly Investment Plan. The Monthly Investment Plan allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from $40 to $1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots. The names and addresses of all of the Monthly Investment Plan customers can be identified as follows:

The firms of Carlisle & Jacquelin and DeCoppet & Doremus operate the Monthly Investment Plan for all the

member firms except Merrill Lynch Pierce Fenner & Smith, Incorporated (hereinafter "Merrill Lynch"). The two odd-lot firms and Merrill Lynch employ computer tapes for this purpose. These tapes contain all the names and addresses of the persons who invest through the Monthly Investment Plan. Each Monthly Investment Plan investor is sent a statement on the part of the respective member of the NYSE each time he adds to his account.

8. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE, approximately 150,000 public individuals had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE through payroll deduction plans, all of which are operated by Merrill Lynch. A payroll deduction plan allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduction by the corporate employer from the salary or wages of the employee. All such sums deducted by the corporate employer are then forwarded to Merrill Lynch which purchases for the employees as many shares as the commingled funds will allow. These shares are then allocated to each corporate employee in proportion to his deduction. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commission and other expenses incurred in the purchase of shares. Since each corporation invests all the commingled money deducted for the purchase of shares, it is usual that the amount so invested does not buy an even number of round-lots only, but includes one odd-lot, the differential of which is shared pro-rata by the participants in the payroll deduction plan. In addition,

virtually all participants in payroll deduction plans elect to have their dividends reinvested in the stock of their corporation. All payroll deduction plan dividends are accumulated and reinvested and since again, there is likely to be one odd-lot, that odd-lot differential is allocated among those who elected dividend reinvestment. The names and addresses of all of the companies and the approximately 150,000 corporate employees who participated during the relevant period in payroll deduction plans can be identified through records of Merrill Lynch.

9. (a) During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eight [*sic*] page insertion in these 755 newspapers was $65,000.00. The NYSE paid $193,194 for this space during the first six months of 1968 and $382,866 during the year 1967. The approximate cost of the space for a single one-eights [*sic*] page insertion in every daily newspaper in the United States and Puerto Rico is $110,000.00. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was $400,000.00. The NYSE advertised in no other media.

(b) There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

10. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally, there are thousands of intermediaries as defined in paragraph 1, above, who are located in virtually every country in the non-communist world.

11. (a) All odd-lots trades on the NYSE are initiated by and executed through the facilities of member firms. In addition, confirmations on all odd-lot trades on the NYSE are sent to the public individual, institution, or intermediary, as the case may be, by the member firm.

(b) All member firms of the NYSE send periodic statements of account to their customers as required by Rule 409(a) of the NYSE which provides:

> (a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter.

(c) NYSE member firms may send other communications to their customers as they desire.

12. (a) From April 22, 1968 to October 2, 1969, 157,919 different account numbers of customers of Walston & Co., Inc. had odd-lot transactions. Of this number 60,855 had more than one such transaction.

(b) Of these account numbers of customers, 10,375 had five or more transactions during this period.

(c) A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

(d) The names and addresses represented by the account numbers referred to in sub-paragraphs 12(b) and 12(c), as well as the names and addresses represented by the account numbers referred to in sub-paragraph 5(b), can be made available to Plaintiff with court process under

an appropriate order or orders. Defendants cannot guarantee that the court will issue such process.

Dated: New York, New York
March 3, 1970

Mordecai Rosenfeld
Mordecai Rosenfeld
Attorney for Plaintiff

Kelley Drye Warren Clark Carr & Ellis
By: Francis S. Bensel
A Member of the Firm
Attorneys for Defendant DeCoppet & Doremus

Carter, Ledyard & Milburn
By: Devereux Milburn
A Member of the Firm
Attorneys for Defendant Carlisle & Jacquelin

Milbank, Tweed, Hadley & McCloy
By: William E. Jackson
A Member of the Firm
Attorneys for Defendant New York Stock Exchange

So ordered

_____

U. S. D. J.

(Exhibit omitted.)

STIPULATION NUMBER 2.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The undersigned, acting pursuant to their agreements made before this Court, hereby stipulate that, for the purposes of this action only and subject to all pertinent objections as to admissibility and relevance the following statements are true:

(1) *Cherner v. Transitron Electronic Corporation,* 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the Court, that defendants would create a $5,300,000 fund to settle all claims. The Court appointed a Special Master, two Assistant Special Masters, (including a computer corporation engaged to process claims), a distribution agent and an agent to arrange for publication of notices.

The Special Master mailed approximately 150,000 applications (forms of proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 applications (claims) covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were invalid, 1,177 were disapproved (143 of these after hearings), and 33,039 were approved.

During the three years required to administer the settlement the Special Master reported to the Court that the original plan of processing each claim regardless of amount, checking each item, comparing each confirmation,

etc., would require "considerable modification" by the Court in order to keep down the expenses of administration of the settlement. Speaking of the difficulties of handling the claims, the Special Master said:

> "In order to examine 50,000 transactions and establish a list of valid claims which can be recommended for allowance, each application must be examined with respect to cost data and disposition data, and such data recorded on magnetic tape. Supporting data should be examined, particularly in the case of claims involving large losses. The burden of checking each transaction in the same manner in which a similar claim might be examined in a bankruptcy case involving 500 claims becomes insupportable where there are 50,000 transactions."

By order dated October 25, 1963, the Court modified the original procedure for payment of claims, and gave the Special Master wide discretion in order to minimize the cost of administration.

The expenses involved in administering the settlement fund were as follows:

(a) counsel fees and expenses of plaintiffs	$ 275,334.18
(b) services and expenses of Special Master	53,962.05
(c) services and expenses of Assistant Special Master (attorney)	78,777.67
(d) services and expenses of Assistant Special Master (Keydata Corporation)	688,092.17
(e) services and expenses of Distribution Agent	11,915.08

(f) services and expenses of agent for publication (not including actual cost of publication)	8,624.26
	$1,116,705.41

By February 3, 1966, the date of the report of the Special Master with respect to winding up the settlement and applying for discharge, distributions had been made to holders of 33,036 claims. During the course of payment of the claims, 1,500 checks could not be delivered and were returned to the Special Master. 550 checks remained undelivered on February 3, 1966.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged $25.47 per person, excluding attorney's fees, and $33.80 per person, including attorney's fees.

(2) In *Illinois Bell Telephone Co. v. Slattery*, 102 F. 2d 58 (7th Cir. 1939) *cert. den.* 307 U. S. 648 (1939), the telephone company was required to make refunds of overcharges to approximately 1,400,000 Chicago area subscribers to business and residence coin box telephone service.

The company mailed 1,213,133 notices of the refund to the last known address of former subscribers. On three occasions full page advertisements, giving notice of the refund and instructions as to the manner in which subscribers could claim refunds, were placed in each of six Chicago area newspapers. The refund procedure began on October 15, 1934 and continued through at least June, 1937.

The company set up 13 new offices in Chicago to handle refunds. Subscribers made 831,328 personal visits to the 13 offices. The company received 91,287 letters and 264,391 telephone calls from subscribers relating to refunds. The various offices of the company made 1,290,078 telephone

calls to the Central Refund Bureau. At one point, over 2,000 employees were engaged exclusively in work concerning refunds.

The company checked current Chicago and suburban telephone directories to locate present addresses of former subscribers to whom company records showed refunds due and unclaimed. As a result of these checks, the company made an additional 35,122 telephone calls to locate these former subscribers and mailed 29,583 special notices to persons so located. This process resulted in claims from 14,074 subscribers who had not previously claimed.

To determine the amount of overcharges, the company recomputed approximately 45,000,000 collection tickets. In order to complete the necessary computations, each ticket was handled seventeen times.

As of May 25, 1937, 1,495,974 refunds were involved. By that date, the company had mailed 268,028 refund checks to present subscribers and 725,490 to former subscribers. Refunds for 310,389 subscribers (approximately 20% of the total) were not yet disposed of. The net amount of these checks was $14,658,518.14, after deduction of $1,271,299.04 in attorneys' fees and deduction of sums due to the company from its subscribers. There remained on hand $1,845,204.29 not yet distributed, subject to additional attorneys' fees of $138,390.32. On January 29, 1938, when the telephone company was finally discharged from liability, there remained on hand $1,600,000 in unclaimed funds belonging to subscribers who could not be located. The company incurred expenses of over $2,700,000 in making the refunds and accumulated 110 tons of records relating to the litigation and the refunds.

Dated: New York, New York
April 17, 1970

Mordecai Rosenfeld
Mordecai Rosenfeld
Attorney for Plaintiff

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So ordered
U. S. D. J.

PORTIONS OF PLAINTIFF'S PROPOSED FINDINGS OF FACT AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 23 F. R. C. P. DATED JUNE 10, 1970.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

* * *

(26) There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both Cherner v. Transitron Electronic Corporation, 201 F. Supp. 934 (D. Mass. 1962) and Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58 (7th Cir., 1939). (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar. Therefore, the pragmatic approach used in the Bebchick and Market Street Railway cases should be adopted here. Indeed, as previously noted, Market Street Railway was decided in the light of the experience in the Illinois Bell Telephone Co. case. We submit, therefore, that there is no doubt that a recovery in this case could be managed and implemented.

* * *

(30)

D. Conclusion of the Manageability Question

In conclusion: We acknowledge that the class is not manageable in the narrow sense that it would be impracti-

cable to compute and award damages to each odd-lot user in the period 1962-1966. But the wrong is no less real because it is divided into a million parts. Equity has, through the years, fashioned a way to deal with the problem of implementing a recovery on behalf of millions of beneficiaries. As outlined above, a reduction in the odd-lot differential in the future would do substantial justice. The defendants' alternative—to permit the wrongdoers to keep their illegal profits because precise justice is not possible—only rewards the wrongdoers. This solution was specifically rejected by the Supreme Court in the *Hanover Shoe* case and should be rejected here.

Defendants' zeal for unobtainable perfection is (31) also the basis of their contention that this class action should be dismissed on the ground that adequate notice cannot be given. Since the notice question is the other broad problem posed by the Second Circuit's decision, we shall discuss it next.

• • •

(38)

2. *If Plaintiff's Proposals on the Manageability Question Are Accepted By the Court, the Need For Individual Notice Disappears.*

Although we believe that the running of the statute of limitations makes any notice requirement for the purpose of opting out moot, we submit that plaintiff's proposed notice proceure is more than adequate even without the limitations argument. In short, if plaintiff's proposal on the manageability question (Point I, *supra*) are adopted, the significance and need of any notice is greatly diminished. Plaintiff proposes, in keeping with the opinions in the Bebchick, Market Street Railway and Perlman v. Feldmann cases (and the other authorities cited in Point I,

supra) that the benefits of this litigation be given to the class as it exists at the time the recovery is made. Therefore, there would be no need for a notice to the 6,000,000 members of the class who existed between 1962 and 1966. Indeed, in practicality, we recognize that it would be impossible for each member of the class to spend hours or days combining his (39) ancient files in order to recover—at best—ten or twenty dollars. Therefore, we proposed that after the amount of the damage is established, the defendants then be ordered to reduce their odd-differential until the damage is repaid. Notice, therefore, would not be sent to the 2,000,000 people whose names and addresses have now become ascertainable. Instead, notice could be given to the present class of odd-lot users by the various ways suggested above. Indeed, in that way virtually every member of the class would be notified. And the cost would be almost nothing.

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OPINION OF TYLER, J., DATED APRIL 7, 1971 PROVIDING THAT ACTION MAY BE MAINTAINED AS A CLASS ACTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Mordecai Rosenfeld, Esq., New York City, for Plaintiff.

Carter, Ledyard & Milburn, Esqs., New York City, for Defendant Carlisle & Jacquelin.

Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., New York City, for Defendant DeCoppett & Doremus.

Milbank, Tweed, Hadley & McCloy, Esqs., New York City, for Defendant New York Stock Exchange.

TYLER, District Judge:

Once again the case of *Eisen v. Carlisle & Jacquelin* has reached the point of determining whether it meets the requirements of a class action under Rule 23 of the Federal Rules of Civil Procedure. This is the latest in a series of opinions dealing with this complex issue, and it may not be the last. To recapitulate: *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147 (S. D. N. Y. 1966) initially determined that this case could not be maintained as a class action; *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035 (1967) [hereinafter cited as *Eisen I*] held that the denial of the class action determination was appealable; *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968) [hereinafter cited as *Eisen II*] reversed the initial denial of the class action and remanded to the district court for further findings necessary for the class action determination; *Eisen v. Carlisle & Jacquelin*, 50 F. R. D. 471 (S. D. N. Y. 1970) called for further information from the parties as required by the Court of Appeals opinion in

Eisen II. The nature of the case and of plaintiff's claims are adequately described in the prior opinions.

All parties have responded ably to the Court of Appeals and latest district court opinions, and it would appear that the court now has sufficient information to make all of the required findings for the class action determination.

First, the findings of fact relevant to the class action determination will be listed.[1] These findings were developed on remand and are based on submissions by the parties. Second, the conclusions required by Rule 23 will be made in light of these findings. Finally, the question of who shall pay for the cost of the Rule 23(c)(2) notice will be discussed.

FINDINGS OF FACT

1. During the period from May, 1962 through June, 1966, approximately 21,000,000 public individuals, institutions and intermediaries [2] (hereinafter collectively referred

1. The detailed findings of fact listed here should in no way be taken as an indication that this is a necessary procedure in every class action determination. See *Interpace Corp. v. City of Philadelphia*, 39 U. S. L. W. 2457 (3d Cir. Feb. 9, 1971). The approach has been dictated by the peculiar background and nature of this case.

2. The term "public individuals" means individuals who are neither members of the New York Stock Exchange nor partners nor stockholders in a member organization of the Exchange.

The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

The term "intermediaries" means non-members of the New York Stock Exchange through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies and non-member broker/dealers who place orders which are processed in an account or accounts in the name of the intermediary.

to as "shareholders") bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly held.

2. Approximately 6,000,000 shareholders had odd-lot transactions (transfers involving less than 100 shares) during the period from May, 1962 through June, 1966 in stocks listed on the New York Stock Exchange (hereinafter "NYSE"). Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5 percent a year, or a total of 600,000 persons.

3. During the period May, 1962 through June, 1966, the "average shareholder"[3] who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at $50.84 per share. The average odd-lot differential per transaction during such period was approximately $5.18.

4. During the period May, 1962 through June, 1968, the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at $51.07 per share. The average odd-lot differential during such period was approximately $5.04.

5. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses

3. I.e., the typical buyer or seller of odd-lots.

of at least one-third, i.e. 2,000,000, can be identified as follows: fourteen of the largest brokerage firms[4] (hereinafter "wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jacquelin or DeCoppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56 percent of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated.

6. Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available, as well as the number of odd-lot transactions executed for each such account number.

7. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

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4. These fourteen firms are: Merrill Lynch, Pierce, Fenner & Smith, Inc.; Bache & Co. Inc.; Francis I. duPont Co. Inc.; Loeb, Rhodes & Co.; Dean Witter & Co. Inc.; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Inc.; Shearson, Hammill & Co. Inc.; Paine, Webber, Jackson & Curtis; Hayden, Stone, Inc.; Reynolds & Co.; E. F. Hutton & Company Inc.; and Dominick & Dominick, Inc.

8. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6 percent reside in foreign countries. The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table attached as Appendix A. From 1962 to 1965, New York and California had by far the largest numbers of such shareowners.

9. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000 or more public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through the "Monthly Investment Plan."[5] Such individuals can be identified through computer tapes in a way similar to that discussed above for approximately 2,000,000 shareholders.

10. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers described above, approximately 150,000 public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through "payroll deduction plans",[6] all of which are operated by Merrill, Lynch, Pierce,

5. The "Monthly Investment Plan" allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from $40 to $1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots.

6. A "payroll deduction plan" allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduc-

Fenner & Smith, Inc. The names and addresses of such individuals can be identified through the records of Merrill, Lynch.

11. During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was $65,000. The approximate cost of the space for a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is $110,000. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was $400,000. The NYSE advertised in no other media.

12. There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

13. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally there are thousands of intermediaries who are located in virtually every country in the non-communist world.

14. Rule 409 of the NYSE provides in part as follows:

(a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money

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6. (Cont'd.)
tion by the corporate employer from the salary or wages of the employee. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commissions and other expenses incurred in the purchase of shares. Normally, a payroll deduction for such purchases requires odd-lot rather than round-lot transactions.

positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter. * * *

(d) Customers' confirmations shall bear a notation or legend which will enable the customer to determine the amount of any odd-lot differential.

15. A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

16. *Cherner v. Transitron Electronic Corporation,* 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the court, that defendants would create a $5,300,000 fund to settle all claims. The court appointed a Special Master, two Assistant Special Masters (including a computer corporation engaged to process claims), distribution agent and an agent to arrange for publication of notice.

The Special Master mailed approximately 150,000 applications (forms for proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 claims covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were invalid, 1,177 were disapproved (143 of these after hearing) and 33,039 were approved.

The approximate expenses involved in administering the settlement fund were as follows: (a) counsel fees and expenses—$275,000; (b) Special Master—$54,000; (c) Assistant Special Master (attorney)—$79,000; (d) Assistant

Special Master (computer corporation)—$688,000; (e) Distribution Agent—$12,000; (f) services related to publication (not including actual publication costs)—$9,000. The total expense was approximately $1,117,000.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged $25.47 per person excluding attorney's fees and $33.80 per person including attorney's fees.

17. The class action aspect of *State of West Virginia v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. N. Y.) (hereinafter cited as the "*Drug Cases*") involved a recovery on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. It is estimated that the class includes approximately 150 million persons located in every state of the Union and Puerto Rico. Defendants in the *Drug Cases* agreed to settle all cases for a total of $100,000,000; $37,000,000 of that was allocated to the class of individual consumers. Defendants also agreed to advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved.

18. The total expense of maintaining and settling the *Drug Cases* consumer class action will be approximately $285,000. These expenses can be divided into the following three categories:

(a) *Rule 23(c)(2) Notice*—A notice informing class members of their right to file claims or opt-out of the class was published in every English and Spanish language newspaper of general circulation published in the United States. The total cost was approximately $130,000. In response to this notice 42 individual consumers served notices opting out. During the months immediately sub-

sequent to publication of this notice, plaintiffs' attorneys received several hundred telephone calls from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice, including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related expenses.

(b) *Rule 23(e) Notice*—A notice of hearing on the proposed settlement was published in the two newspapers of largest circulation in each state. The total cost of this publication was around $30,000. In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Approximate expenses for this notice were: $6,300 for the preparation of the consumer class mailing list and $7,100 for duplicating and mailing the notice. In addition, about $8,500 of general expenses (cost of post office boxes and the expense of an escrow agreement) have been allocated to the consumer class. The total expense to the consumer class was, therefore, $53,000, in round numbers.

(c) *Processing of Claims*—As of August, 1970, plaintiffs' attorneys had received $65,000 for processing consumer claims; the best estimate for the total expense for this item is $100,000. Approximately 42,000 individual claims, representing total drug purchases of approximately $17,000,000, have been filed. All claims have been processed by plaintiffs' attorneys using their own filing system, refund forms and forms for responding to claimants. No special master has yet been appointed or found necessary. Approximately one-half of the 42,000 claims received did not contain sufficient information to be accepted and required follow-up correspondence seeking clarification.

Approximately 80 percent of the claims filed contained only approximate cost information for various reasons, viz.: claimant had no records of drugs purchased; druggist refused to supply the information; drug store had ceased doing business; doctor could not or would not supply the information. To check validity of claims, plaintiffs' attorneys are reviewing each claim where total purchases exceed $1,000 and spot checking all others. Three categories have been established after review: claims approved in full, claims approved in part and disapproved claims. Plaintiffs' attorneys are recommending to the court that all approved claims be paid a fixed percentage of their total drug purchases.

19. Costs of publication of various size notices in newspapers of several large cities are set forth in Appendix B.

20. The printing cost for 2,000,000 copies of plaintiff's proposed notice would be approximately $9,350. The printing cost for 2,000,000 verified claim forms as proposed by defendants would be approximately $9,400.

21. The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10 cents per letter, including the postage, irrespective of the number of letters to be sent.

RULE 23 CONCLUSIONS

I. *Prior Determinations*

The Court of Appeals heretofore has determined that certain requirements on the face of Rule 23 are satisfied in this action. To summarize, under Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; and (3) the claims of plaintiff are typical of

the claims of the class. *Eisen II* at 561-62. Rule 23(b)(1) and (2) are not applicable to this action. *Eisen II* at 564. Under Rule 23(b)(3), the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *Eisen II* at 566, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Eisen I* at 121.

II. *Questions to be Considered on Remand*

A. *Adequacy of Representation*

The first question left open by the Court of Appeals for consideration by this court was whether the plaintiff, as representative party, will fairly and adequately protect the interests of the class. F. R. Civ. P. Rule 23(a)(4). For making this decision, the Court of Appeals set out certain guidelines. First, this court is to determine whether the attorney for plaintiff is "qualified, experienced and generally able to conduct the proposed litigation." *Eisen II* at 562. Second, the court must be satisfied that there is little likelihood of a collusive suit or of plaintiff's having interests antagonistic to those of the remainder of the class. *Id.* Third, and generally, the court must be satisfied that plaintiff is interested enough to be a forceful advocate and that a substantial number of class members would accept him as their representative if they were given a choice. *Id.* at 563 n. 7; Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433, 460 (1960).

I have no hesitation in ruling that plaintiff and his attorney meet all of these requirements. It has already been determined that plaintiff's claim is typical of the claims of the class, and from the nature and quality of the

litigation conducted to date, there is little doubt that plaintiff's attorney is a qualified, forceful advocate who will adequately protect the interests of the entire class. The issues raised thus far have all been hotly disputed, to say the least, and I find no evidence before me that this is a collusive suit. Defendants have suggested that since plaintiff has proposed a "fluid class recovery" as a means of distributing some if not all of the damages to the class, somehow this indicates that he has interests which are antagonistic to the remainder of the class. But, for reasons which are discussed more fully below in connection with the issue of manageability, I reject this argument and find that plaintiff's proposal is a flexible and practical means of satisfying the interests of the entire class.

B. *Manageability*

The second and by far the most difficult question to be considered by this court is what has generally been called the issue of manageability. It derives from one of the factors to be considered under Rule 23(b)(3) in determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pursuant to subparagraph (D), the court must examine "the difficulties likely to be encountered in the management of a class action". Although this is merely one factor among many on the face of the Rule, in a case of the size and nature of this one, the issue of manageability assumes major proportions.

Before discussing specific details of the management of this class action, a definitive ruling should be made as to the exact composition of the class. Based on the allegations in the complaint and on the findings set forth above, the class in this case is composed of all public individuals, institutions and intermediaries who bought and/or sold

odd-lots of shares of stock on the NYSE during the period from May 1, 1962 through June 30, 1966. Such definition is, of course, subject to modification at a later time. Rule 23(d) F. R. Civ. P.

1. *Computation of Damages.* One of the primary concerns of this court in its most recent opinion was whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim. In approaching this question, it is recognized that an exact computation is not required; it is sufficient, of course, if there is relevant data from which the jury can make a just and reasonable estimate of the damages. *Bigelow v. RKO Radio Pictures,* 327 U. S. 251, 264 (1946); see also *Union Carbide and Carbon Corporation v. Nisley,* 300 F. 2d 561, 590 (10th Cir. 1962), appeal dismissed, 371 U. S. 801 (1962). If a wrong has been done, courts generally can find a way of placing a value, albeit a rough one, on the amount of damages suffered.

In this case, I am satisfied that gross damages may be fairly estimated without having individual claims filed by each class member. The sources for such a computation will include at least the following: defendants' own records, the Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) [hereinafter cited as SEC Special Study], records of the NYSE Special Committee on Odd Lots relating to the lowering of the odd-lot differential in 1966 and a cost study of the odd-lot industry conducted for the NYSE by Price Waterhouse & Co. See *Daar v. Yellow Cab Company,* 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732 (1967); *contra, Hawaii v. Standard Oil Company of California,* Civ. No. 2826 (D. Hawaii, filed May 27, 1969).

Defendants consistently have stressed the number of variations in the types of odd-lot transactions, implying that this would necessitate a separate calculation of damage for each individual transaction. Although originally influenced by this argument, see *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966), in light of the availability of such information and records discussed above, I now reject it. As the Court of Appeals has pointed out, moreover, defendants make the same charge to all buyers and sellers no matter what the type of transaction. *Eisen II* at 562.

2. *Mechanics of Administration.* Under this heading the Court of Appeals directed that certain specific questions be considered to insure that insuperable obstacles do not present themselves at a later time after much time and money are expended by both the parties and the court. In the discussion of these questions, it will be noted that most of the estimates involved are based primarily on the experience of this court in administering the settlement of the consumer class action phase of the *Drug Cases.* Defendants have argued, and at least two courts have indicated, that the experience in the *Drug Cases* is not a valid reference for cases where there is no settlement and all issues are disputed to the bitter end. See *Hackett v. General Host Corporation,* Civ. No. 70-364 (E. D. Pa., filed July 30, 1970); Record of May 19, 1970, at 41-42, *Union Health Center of New York v. Chas. Pfizer & Co. Inc.,* Civ. No. 69-2838 (S. D. N. Y.). There is something to be said for this position; thus, where obvious distinctions between this case and the *Drug Cases* have required, I have adjusted estimated expenses accordingly. On the other hand, it is obvious that the major burden and cost of administering this class action will occur, if at all, at the point where liability has been determined and damages awarded. If this case

should ever reach that posture, the remaining task would be distribution of a specific fund and in this sense not very different from the settlement posture and procedures of the *Drug Cases*.

As to the specific areas of determination suggested by the Court of Appeals, first, I find that a special master hopefully and probably will not be necessary in this case. Although a special master and two assistants were appointed in the *Cherner* case at substantial cost, see Finding Number 16, I note that this procedure was successfully avoided in the *Drug Cases* where the burdens have been assumed by plaintiffs' counsel. Although it is true that plaintiff's counsel here is a single practitioner, he may receive assistance from counsel for other class members, and if not, arrangements for administrative assistance should not be too difficult or costly—and less costly, it is to be assumed, than the fees and expenses of a master.

Second, an estimate of the sums required for paperwork, printing, postage and publication is required. These sums can be divided into three categories: (a) Rule 23(c)(2) Notice, (b) Rule 23(d) Notice if liability and damages are determined and (c) processing of claims and inquiries.

(a) As discussed more fully below, the cost of notice required by due process and Rule 23(c)(2) in this case can be computed at approximately $21,720.

(b) If liability and damage should be determined, more extensive notice to invite filing of claims under Rule 23(d) might be possible since the expense of such notice could be deducted from the total amount of damages. Thus, estimates for mailing individual notices to the 2,000,000 identifiable class members here, see Finding Number 5, would be $9,350 for printing notices, $9,400 for

printing proof of claim forms and $200,000 for stuffing and mailing. In addition, relying on the *Drug Cases,* published notice might be required in the two newspapers of largest circulation in each state at a cost of approximately $30,000. Publication in several major foreign newspapers can be estimated at $23,000. See Finding Number 19 and Appendix B.

(c) Processing of the 42,000 individual claims filed in the *Drug Cases* is expected to reach a total cost of approximately $100,000. See Finding Number 18. However, since this figure may not reflect the cost of processing of inquiries after the Rule 23(c)(2) notice and because there is great likelihood that there may be a larger number of claims filed in the instant case, an estimate for processing of claims and inquiries should be double the *Drug Cases* figure, or approximately $200,000.

Thus, combining all three categories, at this point in the litigation the best estimate of the total sums required for paperwork, printing, postage and publication is $500,000 in round numbers.

The third mechanical question generally concerns procedures for possible intervention of other class members. See *Eisen II* at 567. As the class action device has come to be used more frequently, the experience in this court has indicated that intervention can be accomplished by very simple procedures. For example, class members so inclined might contact plaintiff's counsel and make an appropriate motion setting forth concise facts indicating that the would-be intervenors qualify as class members.[7]

7. Also, the appellate court suggested, *Eisen II* at 567, that consideration be given to possible problems of jurisdiction and venue. Upon remand, counsel have not suggested nor do there appear to

The fourth mechanical question concerns possible problems class members might have in filing and proving their claims. Filing, of course, can be routinely accomplished by filling out and mailing in a proof of claim form to be supplied by the court through plaintiff's counsel. Defendants have already proposed a form which appears acceptable, with some possible minor modifications. Claims can be proved either by verification or certification by the claimant's broker-dealer. An analogous method has proved satisfactory in the *Drug Cases*. See also *Union Carbide and Carbon Corporation v. Nisley, supra* at 587-88. Defendants have submitted affidavits of brokers stating that, because of routine destruction of records or practical impossibility, they would be unable to furnish customers with records of their odd-lot transactions in the relevant period. Accepting these affidavits as true, they do not establish that all such records are unavailable through broker-dealers; moreover, it cannot be assumed from these available affidavits that customers are without records of their own. Lost or missing records are normal hazards of litigation in general; this circumstance cannot be fairly raised as a bar to class litigation.

3. *Distribution of Recovery*. The Court of Appeals has made clear that one of the most important considerations in a case of this type is the likelihood that class members will share in any eventual judgment. In weighing the class action question, the trial court must balance the desirability of providing a forum for bona fide small claims against the impropriety of permitting suits which only benefit lawyers. *Eisen II* at 567. Crucial also is the ability of the court to

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7. (Cont'd.)
exist significant jurisdictional problems, save perhaps those related to the substance of plaintiff's claims discussed hereinafter. Since defendants are located within this district, as is the bulk of relevant documentary evidence, venue seems proper here. Finally, no significance in relation to the class action determination issue attaches to the fact that plaintiff has already demanded a jury trial.

fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits. See *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, 14 F. R. Serv. 2d 420 (C. D. Cal. 1970); *Daar v. Yellow Cab Company, supra.* Cf. *Bigelow v. RKO Radio Pictures, supra* at 264.65.

Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly stereotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims. These transactions are also frequently repeated by many individuals who may be expected to repeat. See Finding Number 2.

With these indicia present, I think it appropriate, as plaintiff urges, to consider some kind of "fluid class recovery", i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it

possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts. Indeed, there is respectable precedent for such a "fluid class recovery". See *Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir. 1963), cert. denied, 373 U. S. 913 (1963); the *Drug Cases, supra; Daar v. Yellow Cab Company, supra.* This does not mean, of course, that individual recovery is to be entirely ruled out. Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder.

It is not now necessary to determine the exact nature of fluid class recovery which might be used in this case. That is a matter for the court and the parties if and when liability is determined and damages assessed. It is necessary to recognize at this point, however, that a method of recovery of damages not claimed by individual class members can be fashioned to substantially benefit the entire class. In this regard, plaintiff has suggested that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted. See *Bebchick v. Public Utilities Commission, supra; Daar v. Yellow Cab Company, supra.* In this manner, the class members, assuming they have maintained their odd-lot activity, will reap the benefits of any recovery. Without intending to rule now on the nature of any possible recovery in this case, suffice it to say that plaintiff's suggestion has sufficient merit to at least satisfy the court that some method of distribution will be possible if required.

Defendants have argued that plaintiff, by advancing this proposal, has effectively abandoned the original class

and thereby established his inadequacies as champion of that class. I am constrained to disagree, however, since the proposal is specifically designed to provide the best practicable method of benefiting the original class—i.e. to insure that the litigation, if successful for the class, does not founder upon shoals of excessive costs and detail in awarding and computing damages on an individual basis. In addition, defendants have suggested that plaintiff's proposal would constitute "judicial rate-fixing", thereby infringing upon the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). This argument may have merit, but defendants press it too far—i.e. such a reduction in the differential, if carried out, might properly be done under SEC supervision or at least with SEC approval.

Having thus considered possible methods for distribution of a recovery, there remains only for consideration the "mathematical prospects" of the case in order to ascertain at least the theoretical availability of a fund from which to distribute damages. This simply means and requires a rough estimation of potential damages, deducting therefrom the estimated costs of administration to determine a net potential fund available for actual distribution. The costs of administration were estimated heretofore at $500,000. Estimating gross potential damages is necessarily more difficult, but a rough maximum and minimum might be arrived at as follows: (1) maximum—defendants' reduction of the odd-lot differential in 1966 amounted to approximately $5,000,000 per year—multiplied by the four years here in question and trebled, damages might be $60,000,000; (2) minimum—assuming a five percent illegal portion of the odd-lot differential during the relevant period[8] and apply-

8. Plaintiff has estimated that he paid $259 in odd-lot differentials from 1960-1966 and that his damages were about $70. Thus, his claim is that approximately 27 percent of the charge was illegal. For purposes of establishing a minimum on potential damages, I have arbitrarily chosen 5 percent.

ing it to the average number of transactions and the average differential during the relevant period, multiplied by 6,000,000 and trebled, damages might be approximately $22,000,000. Thus, it becomes apparent that if plaintiff succeeds on behalf of the class, there will be a substantial recovery to be distributed.

C. *Notice*

Determination of the kind of notice and how to disseminate it, as this case illustrates, can be a difficult task for the district court. Notice must be governed not only by basic due process standards but also by the standards of Rule 23 (c)(2) itself. Thus, an examination of these requirements will be necessary before determining the kind of notice appropriate in this case.

As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 36 (1950), the fundamental requirement of due process in any final proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The test is a flexible one and must be applied on a case-by-case basis: "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15. Frequently a balancing of interests is required. *Id.* at 313-14. In addition, emphasis is to be placed upon the procedure adopted as a whole to insure that it results in full and fair consideration of all claims and adequately protects the interests of those persons not present but bound by the judgment. *Hansberry v. Lee*, 311 U. S. 32 (1940). See also *Mullane v. Central Hanover Bank & Trust Co., supra* at 319; *Dolgow v. Anderson*, 43 F. R. D. 472, 500 (E. D. N. Y. 1968); *Northern Natural Gas Co. v. Grounds*,

292 F. Supp. 619, 636 (D. Kans. 1968); *State of Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S. D. Iowa 1968), aff'd., 408 F. 2d 1171 (1969).

Rule 23(c)(2) does not add to these requirements; it simply formulates guidelines for a particular kind of notice in a particular kind of action. See *Eisen II* at 568; Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F. R. D. 98, 107 (1965) [hereinafter cited as Advisory Committee's Note]. The district court must direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." F. R. Civ. P. Rule 23(c)(2). As is clear from the face of the Rule, the notice should be designed to inform class members of the possibility of their excluding themselves from the action, the possibility of their appearing and participating in the action and the fact that they will be bound by any judgment if they do not exclude themselves. In light of these purposes, it naturally follows that as the size of potential recovery available to each class member diminishes, any incentive class members may have to respond to the notice also diminishes. See *Berland v. Mack*, 48 F. R. D. 121, 129 (S. D. N. Y. 1969). Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.

Although not so stated in the Rule, the notice effectively serves to protect defendants in two ways. First, by including in the judgment all members who do not affirmatively opt out, defendants can obtain significant *res judicata* benefits. Second, a large number of class members may opt out, not wishing to press their claims even though they may be legitimate. In the context of this case, it is sig-

nificant that the applicable statute of limitations has run, 15 U. S. C. § 15b (1964); hence *res judicata* consequences presumably matter little to defendants. But see *Philadelphia Electric Company v. Anaconda American Brass Company*, 43 F. R. D. 452, 461 (E. D. Pa. 1968).

Finally, in determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation. See *Herbst v. Able*, 47 F. R. D. 11, 21 (S. D. N. Y. 1969); *Dolgow v. Anderson*, *supra* at 497. Cf. *Booth v. General Dynamics Corporation*, 264 F. Supp. 465 (D. Ill. 1967). Hence, the district court must strive to fashion notice which fairly and adequately protects all interests in the action without imposing what in effect amounts to an insuperable tariff on prosecution of the case.

1. *Form of Notice.* Applying these general principles to the case at hand, the Court of Appeals has indicated that there should be some "evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2)." *Eisen II* at 569. I believe that the findings of fact enumerated above should satisfy this requirement, and they are to be deemed incorporated in this discussion.

First, plaintiff has offered to send individual notice to all member firms of the NYSE and to all commercial banks with large trust departments, the assumption being that many class members may thus receive indirect but nevertheless effective notice. Although, by itself, this would be far from satisfactory, in combination with the other forms

of notice discussed below, this proposal does increase the likelihood of reaching a significant portion of the class. The same is true for any news coverage which might be generated during the course of this suit. See *Snyder v. Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N. D. Ill. 1968); *Johnson v. Robinson*, 296 F. Supp. 1165 (N. D. Ill. 1967), aff'd, 394 U. S. 847 (1969).

Second, some form of mailed notice must be sent to individual class members who are reasonably identifiable. Defendants have taken the position that any mailed notice must go to all of the approximately 2,000,000 class members who are identifiable. See Finding Number 5. Although the argument has some merit, I conclude that such notice is not compelled by the standards of due process and Rule 23(c)(2) in the context of this case. First, the flexibility of the rule is clear on its face, speaking in terms of the "best notice practicable under the circumstances" and of class members who are identifiable "through reasonable effort."[9] In addition, even due process requirements have been phrased in terms of identifying persons whose names and addresses are "very easily ascertainable." *Schroeder v. City of New York*, 371 U. S. 208, 212-13 (1962).

Individual notice in this case shall be mailed to the approximately 2,000 or more class members who had ten or more transactions during the relevant period. See Find-

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9. See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 396 (1967):

> In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up.

ing Number 15.[10] This accords with the Court of Appeals' suggestion of trying to identify those class members who may have "enough of a stake in the proceedings to justify personal intervention." *Eisen II* at 569. In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random from the 2,000,000 persons and firms who are identifiable.[11] The total cost would be approximately $1,000 for printing, stuffing and mailing.

Third, and finally, notice by publication shall be required as a feasible attempt to reach the remainder of the class. Such notice shall be one-quarter page in size and shall take place once each month for two consecutive months in the following publications: (1) national edition of the *Wall Street Journal* (approximately $5,000); (2) financial section of the *New York Times* (approximately $2,100); (3) financial sections of the *San Francisco Chronicle* and *San Francisco Examiner* (approximately $1,700); and (4) financial section of the *Los Angeles Times* (approximately $1,560). Obviously, these are somewhat arbitrary determinations intended to provide the most suitable notice under the circumstances, but there are significant reasons for choosing these publications. The *Wall Street Journal* has long served the overall community of investors, and the national edition should reach a large and disparate number of class members. Also, as of 1965, New York and California had by far the largest number of shareowners of public

10. The figure in Finding Number 15 is based on a representative sample of the tapes of four of the fourteen wire firms which have such tapes. I assume that a survey of the remaining tapes will turn up more than the approximately 2,000 identified so far.

11. There is an additional reason for requiring this random notice—it is theoretically possible that the large claimants might form a special subclass either friendly toward defendants or not entirely representative of the small claimants.

corporations in comparison to all other states; there is no reason to suppose their position has slipped in the intervening six years. See Finding Number 8 and Appendix A. Selection of the particular cities and newspapers is designed to reach the largest number of class members in those areas.

In the circumstances of this case, I reason that such notice devices together will fairly accommodate the interests of both the class and the defendants. Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the interests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case. See *Eisen II* at 563.

2. *Contents of Notice.* Although it is not necessary to decide now the final content of the notice, plaintiff has made a proposal, attached as Appendix C, which is succinct and, with minor modifications, should be satisfactory. That proposal specifically includes a brief description of the proposed fluid class recovery, thus giving each class member an opportunity to express himself on this aspect of the suit. In order to gain more information about the nature of the class, the mailed notice to individual class members will also include a request for the following information: the number of odd-lot transactions during the 1962-1966 period, specifying for each the number and price of shares bought or sold, the name of the stock, the name of the brokerage firm and the amount of the odd-lot differential charge if known. Such a request will be for voluntary responses only and will

not be treated as a requirement for inclusion as a member of the class. But see *State of Iowa v. Union Asphalt & Roadoils, Inc., supra* at 403-05; *Philadelphia Electric Company v. Anaconda American Brass Company, supra* at 462. Not only would such a mandatory procedure be contrary to the language of Rule 23(c)(2), but also it would be unnecessary in this case in light of the contemplated method of computing damages and the proposed fluid class recovery heretofore discussed.

3. *Administration of Notice.* Plaintiff shall be responsible for making all arrangements for printing, mailing and publication, except that defendants shall supply him with all necessary names and addresses of individual class members. The individual notice will be sent on court stationery from the Clerk of the Court with a special post office box designated for all responses. Inquiries and responses will be managed by the plaintiff under court supervision.

III. Cost of Notice

The question of who shall pay for the Rule 23(c)(2) notice is the only serious obstacle remaining which might prevent the maintenance of this suit as a class action.[12] Plaintiff has asserted from the outset that he cannot pay for the forms and methods of notice ruled necessary in this case, and if I were to follow literally the earlier indication of the Court of Appeals that the plaintiff must always pay for the expense of notice in the first instance, *Eisen II* at 568, this litigation would come to an abrupt termination.

Thus, the doubts and difficulties of this class action become finally focused on this one issue. If the expense of

12. The cost of any subsequent notice, for example under Rule 23(d) regarding the filing of claims, should not present the same problem since the issue of liability will have already been determined.

notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, *Eisen II* at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in defendants' passing on to their customers, including many of the class members in this case, the expenses of defending these actions.

A. Considerations in Allocating Expenses of Notice

After reviewing all of the submissions and arguments of the parties to date, I conclude that I cannot now fairly decide the question of who shall bear the expense of the Rule 23(c)(2) notice. There are various considerations which lead to the conclusion that, in the context of this case, it may be appropriate to impose a share or a substantial portion of the notice expense on the defendants.

First, the issue of who shall bear these expenses has not been decided as one rule to be applied to all cases. Although some courts and commentators have assumed that plaintiff shall always pay the cost in the first instance,[13] some have also declined to make such an assumption and recognized the propriety of apportioning the burdens in

13. See *Weiss v. Tenney Corp.*, 47 F. R. D. 283, 294 (S. D. N. Y. 1969); *Richland v. Cheatham*, 272 F. Supp. 148, 156 (S. D. N.Y. 1967); Ward and Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B. C. Ind. & Com. L. Rev. 557, 566-67 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, supra* at 398 n.157; Frankel, *Amended Rule 23 from a Judge's Point of View* in Symposium, "Amended Federal Rule 23: Antitrust Class Actions?" 32 A. B. A. Antitrust L. J. 251, 300 (1966). *Compare* Wright, Remarks to Judicial Conference of the Third Circuit, 42 F. R. D. 437, 565 (1966) *with Wright*, Class Actions, 47 F. R. D. 169, 180 (1969).

certain cases.[14] Indeed, despite the apparently unequivocal language in *Eisen II, supra,* the Court of Appeals for this circuit has indicated in a subsequent opinion that the question is still an open one. *Green v. Wolf Corp.,* 406 F. 2d 291, 301 n. 15 (2d Cir. 1968). I think that the better view is that the decision on this question, whenever required because of plaintiff's inability to pay, is an appropriate area for the exercise of the court's discretion, "having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." *Berland v. Mack, supra* at 131. To the extent that this may result in the imposition of a burden on defendants prior to trial, analogy to the preliminary injunction remedy lends some support. A prime policy consideration underlying preliminary injunctive relief may be applicable here, viz., the need to create or preserve a state of affairs which will enable the court to render a meaningful decision. See Note, *Developments in the Law—Injunctions,* 78 Harv. L. Rev. 994, 1056 (1965).

Second, this court cannot overlook the serious nature of the antitrust claims in this suit when viewed against the strong public policy behind the antitrust laws in general, and the fundamental role of the private treble-damage action in enforcing those laws in particular. See *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 131 1969); *United States v. Borden Company,* 347 U. S. 514,

14. See *Bragalini v. Biblowitz,* CCH FED. SEC. LAW REP. ¶ 92,537 (S. D. N. Y. Dec. 16, 1969); *Herbst v. Able, supra; State of Minnesota v. United States Steel Corporation,* 44 F. R. D. 559, 577 (D. Minn. 1968); *Dolgow v. Anderson, supra* at 498-500; Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 Md. L. Rev. 139, 156 (1969); Note, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 Harv. L. Rev. 874, 938 (1958).

518 (1954); *Monarch Life Insurance Company v. Loyal Protective Life Insurance Company,* 326 F. 2d 841, 845 (2d Cir. 1963), cert. denied 376 U. S. 952 (1964). In a case such as this, even if the Securities and Exchange Commission were to bring its own action, it would be limited to seeking an injunction only, practically less than an adequate remedy since many of the alleged practices of defendants have been subsequently modified. The private class action is the only means of providing for repayment of any alleged illegal profits. See *Dolgow v. Anderson, supra* at 482-83.

Third, because the statute of limitations has now run in regard to the claims in this case, no one else will be able to pursue the offenses alleged here, not even the government. See *Green v. Wolf Corp., supra* at 301 n. 14. But see *Philadelphia Electric Company v. Anaconda American Brass Company, supra* at 461. In sum, plaintiff's action provides the only available means of reaching the merits of this controversy.

Fourth, after reviewing the purposes and structure of Rule 23, the Court of Appeals has specifically held that it is to be given a liberal rather than a restrictive interpretation. *Eisen II* at 563.

Fifth, the public interest in this case is at least theoretically great, not only because of the serious nature of the antitrust claims, but also because of the large number of persons affected by the allegedly illegal overcharge. The New York Stock Exchange and its member brokers owe very important duties to investors, see generally 15 U. S. C. §§ 78a *et seq.* (1964), and this suit directly raises questions concerning public confidence in the stock market and its fiduciary institutions. Cf. *Silver v. New York Stock Exchange,* 373 U. S. 341, 349-50, 359 (1963).

Sixth, a class action will provide important *res judicata* effects for defendants, although it is true that this consid-

eration is of little importance here because the statute of limitations has run.

Seventh, and finally, although the court has by no means reached the substance of this case as yet, there are bases for presuming merit in plaintiff's claims. In view of the SEC SPECIAL STUDY, *supra,* and the NYSE cost study and subsequent reduction of the odd-lot differential by approximately $5,000,000 per year, this cannot presently be characterized as a frivolous suit. From this it follows that it would be unfair to tax plaintiff with the cost of paying for notice at this point.

B. *Preliminary Hearing on Merits*

Before considering how to apportion the costs of notice, if plaintiff cannot pay, the court itself must have a preliminary but reasonably thorough view of the merits of the case. See *Berland v. Mack, supra* at 132. Cf. *City of New York v. International Pipe and Ceramics Corporation,* 410 F. 2d 295, 297 (2d Cir. 1969); *Green v. Wolf Corp., supra* at 294. Again, an analogy to the preliminary injunction is helpful: before imposing a burden on defendants prior to trial, plaintiff must make a strong showing of likelihood of success at trial on the merits. See *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F. 2d 738, 740 (2d Cir. 1953). Such a procedure is allowed even though the court cannot be assured of plaintiff's final success, particularly where the ultimate issues are to be decided by a jury. *Id.* But see *Berland v. Mack, supra* at 132.

In this case, the most efficient way for the court to become sufficiently aware of the merits of plaintiff's claims to make a reasoned decision on the cost of notice is to hold a preliminary hearing on the merits similar to that originally suggested in *Dolgow v. Anderson, supra* at 501. Although such a hearing has been considered and rejected

by several courts, the facts and circumstances of those cases were markedly different from those at hand, thereby rendering those decisions distinguishable.[15]

Holding a preliminary hearing at this stage will allow the parties to conduct significant discovery, limited by the date set for the hearing. See *Dolgow v. Anderson, supra* at 502. There may be some duplication of discovery if notice should eventually go out and other counsel for plaintiffs intervene, but the court undoubtedly will be able to control any such problems.

The preliminary hearing will also serve to place the risk of success equally upon the class and defendants without requiring a crucial determination prematurely. Although it is true that counsel for other class members who later choose to intervene will not be able to participate in this preliminary hearing, this is a necessary concomitant of the procedures required by Rule 23. Moreover, the court has already determined that plaintiff's counsel adequately represents the class.

I have also determined that a preliminary hearing is superior to other possible procedures. One such alternative would be to allow the action to proceed to a determination on the merits before assessing the costs of notice and send notice only if plaintiff is successful. Compare *Union Carbide and Carbon Corporation v. Nisley, supra* with *Oppenheimer v. F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). This suggestion must be rejected for several reasons: (1) it is at least theoretically contrary to the language of Rule 23 calling for an early determination

15. See *City of Philadelphia v. Emhart Corp.*, 14 F. R. Serv. 2d 332, 334 (E. D. Pa. 1970); *Fogel v. Wolfgang*, 47 F. R. D. 213, 215 n.4 (S. D. N. Y. 1969); *Berland v. Mack, supra* at 132; *Mersay v. First Republic Corporation of America*, 43 F. R. D. 465, 469 (S. D. N. Y. 1968). But see *Green v. Wolf Corp., supra* at 301 n.15; *Cannon v. Texas Gulf Sulphur Co.*, 47 F. R. D. 60 (S. D. N. Y. 1969).

of the class action question; (2) in effect it amounts to "one-way intervention," a procedure the rule was designed to avoid, Advisory Committee's Note, *supra* at 105-06; (3) counsel for other class members may desire to participate at an early stage. Another alternative might be to simply allow the action to proceed with discovery and pre-trial motions, postponing a decision on the cost of notice until some unspecified later date. See *City of Philadelphia v. Emhart Corp., supra* at 335-36. This, however, may well lead to a point at which the court and the parties become "hopelessly entangled in a mass of procedural detail and expense." *Eisen II* at 570.

Finally, after the hearing and after all papers have been submitted, a motion for summary judgment by either side may be appropriate, cf. F. R. Civ. P. Rule 12(b)(6), but I am quick to point out my reluctance to treat the proceedings as a forerunner to such a motion and my inclination to limit any determination solely to the question of who shall bear the expense of the Rule 23(c)(2) notice. See *Dolgow v. Anderson*, — F. 2d —, Docket No. 33719 (2d Cir., filed Sept. 2, 1970). Summary judgment is such a drastic remedy that only in the most compelling circumstances should it be considered without opportunity for participation by other class members.

C. *Nature of Preliminary Hearing*

The preliminary hearing will be commenced no later than 60 days from the date of the filing of this opinion. This should allow sufficient time for minimum necessary discovery and at the same time prevent the proceedings from continuing longer than absolutely necessary. The hearing itself should be brief, and the parties are encouraged to submit whatever evidence they deem relevant in the form of stipulations, affidavits or depositions to the

extent that they are practicable. Actual testimony should be required only from very important witnesses.

As to the merits of the controversy, the parties are directed to address the following issues: (1) did the brokerage defendants monopolize the odd-lot market on the NYSE from 1962 to 1966; (2) did the brokerage defendants control the competition and the odd-lot differential charge in such market; (3) if such conduct by the brokerage defendants can be shown, did the NYSE breach its duties to investors under the Securities Exchange Act of 1934 by failing to exercise proper control; (4) what were the effects of the alleged anticompetitive conduct; (5) to what extent did the Securities and Exchange Commission exercise actual supervision and review over the conduct of defendants in the odd-lot field during the relevant period; (6) to what extent did the regulatory scheme set up under the Securities Exchange Act of 1934 perform an antitrust function; (7) was the conduct of defendants necessary to make the Securities Exchange Act of 1934 work? See, generally, *Silver v. New York Stock Exchange, supra; United States v. E. I. duPont de Nemours Co.*, 351 U. S. 377 (1956); *Thill Securities Corporation v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970); 15 U. S. C. §§ 78a *et seq.* (1964). Amicus brief will be invited from the SEC and the Antitrust Division of the Justice Department. See *Thill Securities Corporation v. New York Stock Exchange, supra* at 273.

After the hearing the following alternative courses of action are open to the court, all subject to reallocation after trial: (1) plaintiff might be required to pay the entire cost of notice; (2) plaintiff and defendants might share the cost in a proportion to be decided; (3) defendants might be required to pay for a major portion of the cost with plaintiff paying a substantial amount and posting a bond

for the balance allocated to defendants, cf. F. R. Civ. P. Rule 65(c); Note, *Interlocutory Injunctions and the Injunction Bond,* 73 Harv. L. Rev. 333 (1959).

In summary, for the reasons discussed above I have determined that this suit is a proper class action under F. R. Civ. P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such. The parties are directed to expedite discovery and preparation for the preliminary hearing as outlined in this opinion.

Finally, it should be recalled that the Court of Appeals in *Eisen II* (at 570) expressly retained jurisdiction of the class action determination issue. Admitting to some uncertainty on the point, I believe that in the interests of orderly procedure and a complete record, any appeal should await the outcome of the preliminary hearing directed in this opinion.

It is so ordered.

Dated: New York, N. Y.
April 7, 1971.

H. R. Tyler, Jr.
U. S. D. J.

APPENDIX A TO OPINION OF TYLER, J.

Geographic Distribution of Shareowners of Public Corporations.

State	*Number of Shareowners (thousands)*			
	1956	1959	1962	1965
Alabama	30	87	114	172
Alaska	—	3	5	9
Arizona	33	62	95	179
Arkansas	17	50	58	94
California	1,011	1,480	2,037	2,540
Colorado	75	112	157	240
Connecticut	219	300	459	505
Delaware	37	50	75	79
Dist. of Columbia	57	112	126	121
Florida	172	312	522	704
Georgia	65	137	170	243
Hawaii	—	13	18	39
Idaho	10	26	33	43
Illinois	732	874	1,157	1,308
Indiana	117	237	374	382
Iowa	78	125	187	202
Kansas	54	112	157	221
Kentucky	53	100	124	161
Louisiana	64	100	151	149
Maine	56	75	94	123
Maryland	144	237	367	424
Massachusetts	531	512	681	805
Michigan	370	625	794	946
Minnesota	110	175	255	260
Mississippi	15	38	61	92
Missouri	178	325	408	501
Montana	29	37	59	61

State	*Number of Shareowners (thousands)*			
	1956	1959	1962	1965
Nebraska	36	50	90	99
Nevada	11	13	23	42
New Hampshire	59	50	75	101
New Jersey	554	625	902	1,086
New Mexico	10	37	46	60
New York	1,699	1,903	2,341	2,407
North Carolina	50	125	238	322
North Dakota	11	12	36	30
Ohio	317	587	791	865
Oklahoma	51	100	134	181
Oregon	54	100	152	200
Pennsylvania	671	1,024	1,378	1,408
Rhode Island	84	75	99	122
South Carolina	19	63	71	117
South Dakota	18	25	38	40
Tennessee	57	100	134	201
Texas	160	375	517	744
Utah	23	37	50	78
Vermont	29	37	55	72
Virginia	120	250	302	422
Washington	77	149	202	262
West Virginia	58	100	102	100
Wisconsin	167	212	323	360
Wyoming	12	26	30	41
U. S. Terr. & Poss.	8	3	5	14
Foreign Countries—U. S. Citizens Living Abroad	18	96	138	143

APPENDIX B TO OPINION OF TYLER, J.

	Full Page	*½ Page*	*¼ Page*	*Circ.*
Wall St. Journal				
National	$19,855.68	$9,927.84	$4,963.92	1,262,000
Eastern	7,672.32	3,836.14	1,918.08	520,000
Midwest Edition	6,287.04	3,143.52	1,571.76	390,000
Pacific Coast	3,907.20	1,953.60	976.80	231,000
Southwest	2,344.32	1,172.16	586.08	120,000
New York				
News—Full Run (Daily)	5,530.00	2,765.00	1,382.50	2,130,000
News—City & Sub.	4,940.00	2,470.00	1,235.00	1,805,000
Post	3,492.00	1,746.00	873.00	698,845
Times	8,400.00	4,200.00	2,100.00	977,297
Chicago				
News	3,918.40	1,959.20	1,066.40	453,000
News (Sun. Times—City & Sub.)	2,899.00	1,574.80	787.40	402,000
News (Sun. Times—Full Run)	3,188.90	1,732.28	866.14	453,000
Sun-Times	1,875.00	1,026.00	427.50	530,000
Sun-Times (News—City-Sub.)	1,650.00	906.00	453.00	506,000
Sun-Times—News—Full Run	1,815.00	1,122.00	561.00	530,000
Today—Full Run	1,537.00	864.00	432.00	435,000
Today—(City-Sub.)	1,175.00	720.00	360.00	422,000
Today (Tribune) Full Run (C.&S.)	1,175.00	720.00	360.00	422,000
Tribune Full Run	5,498.00	2,876.80	1,531.00	768,000
Tribune (City & Sub.)	4,615.00	2,467.60	1,351.60	623,000
Tribune (Today) Full Run	4,876.00	2,592.00	1,296.00	768,000
Tribune (Today) (City & Sub.)	4,154.00	2,219.00	1,215.00	623,000
Los Angeles				
Herald Examiner	4,009.60	2,004.80	1,052.80	503,000
Times	5,424.00	3,120.00	1,560.00	982,000
San Francisco				
Chronicle	5,658.80	2,829.40	1,414.70	480,000
Examiner	3,347.12	1,673.56	836.78	204,000
Chronicle/Examiner	6,742.40	3,371.20	1,685.60	684,000
London				
Daily Express (D.M.)	12,600.00	6,300.00	3,150.00	3,947,500
Daily Mail (D.M.)	7,800.00	3,900.00	1,950.00	1,992,500
Daily Mirror (D.M.)	9,674.00	4,837.00	2,419.00	4,924,000
Daily Sketch (D.M.)	1,910.00	955.00	475.00	900,000
Daily Tele. & Sun. Tel. (D.M.)	9,300.00	4,650.00	1,325.00	1,400,000
Evening News (D.E.)	7,865.00	3,933.00	1,966.00	1,088,500
Evening Standard (D.E.)	2,886.00	1,440.00	720.00	595,000
Financial Times (Wkly. Bus.)	5,069.00	2,535.00	1,267.00	172,347
Greyhound Express (D.M.)	436.00	218.00	109.00	68,000

Appendix B

	Full Page	*½ Page*	*¼ Page*	*Circ.*
London (cont'd)				
The Guardian (D.M.)	3,600.00	1,800.00	900.00	293,000
Inv. Chr. & Stock Ex. Gaz. (W.B.)	600.00	300.00	125.00	50,000
Morning Star (D.M.)	720.00	360.00	180.00	62,000
News of the World (Weekly)	20,259.00	10,129.00	5,065.00	6,228,000
Observer (Weekly)	8,025.00	4,013.00	2,006.00	879,000
The People (Weekly)	17,280.00	8,640.00	4,320.00	5,455,500
Sunday Express (Weekly)	16,200.00	8,100.00	4,050.00	4,206,500
The Sunday Times (Weekly)	12,672.00	6,336.00	3,168.00	1,500,000
The Times (D.M.)	5,750.00	2,875.00	1,438.00	437,500
Sun (D.M.)	1,815.00	908.00	454.00	951,000
Sunday Mirror (Weekly)	9,758.00	4,879.00	2,440.00	5,009,000
Paris				
L'Aurore (D.M.)	3,825.00	1,913.00	956.00	329,000
L'Equipe (D.M.)	2,253.00	1,127.00	563.00	365,000
Le Figaro (D.M.)	4,052.00	2,021.00	1,013.00	424,500
France—Dimanche (Weekly)	7,659.00	3,830.00	1,915.00	1,270,500
France—Soir (D.E.)	9,400.00	4,700.00	2,350.00	1,049,000
Le Herisson—La Presse (Weekly)	2,273.00	1,137.00	568.00	400,000
Ici Paris (Weekly)	6,052.00	3,026.00	1,513.00	981,000
Le Journal du Dimanche (W.B.)	4,550.00	2,275.00	1,137.00	550,000
Minute (Weekly)	1,470.00	735.00	368.00	151,500
Le Monde (D.E.)	3,310.00	1,655.00	828.00	355,000
Paris-Jour (D.M.)	1,430.00	715.00	358.00	257,500
Paris-Presse-l'Intransigeant (D.M.)	2,478.00	1,239.00	620.00	50,000
Le Parisien Libere (D.M.)	8,583.00	4,292.00	2,146.00	778,000
La Vie Francaise (W.B.)	3,550.00	1,775.00	838.00	102,500
Rome				
Avanti	2,048.00	1,024.00	512.00	130,000
Corrieredello Sport (D.M.)	2,306.00	1,153.00	577.00	191,500
Daily American (D.M.)	1,891.00	946.00	473.00	36,000
Giornale d'Italia (D.E.)	2,884.00	1,442.00	721.00	90,000
Il Globo (D.E.)	2,388.00	1,194.00	597.00	35,000
Il Messaggero (D.M.)	4,450.00	2,225.00	1,113.00	301,000
Momento Sera (D.E.)	2,336.00	1,168.00	584.00	80,000
L'Osservatore Romano (D.M.)	2,453.00	1,227.00	614.00	70,000
Paese Sera (D.)	3,116.00	1,558.00	779.00	180,500
Il Popolo (D.M.)	2,160.00	1,080.00	540.00	106,000
Il Tempo (D.M.)	3,895.00	1,947.00	974.00	220,000
Il Fiorine (D.M.B.)	2,670.00	1,335.00	667.00	49,000

D.M. = Daily Morning
D.E. = Daily Evening
D. = Daily
W.B. = Weekly Business
C.&S. = City & Suburban

APPENDIX C TO OPINION OF TYLER, J.

Plaintiff has brought an action in the United States District Court for the Southern District of New York on his own behalf and on behalf of all other persons who had an odd-lot transaction on the New York Stock Exchange in the period 1962-1966 (the "class"). The defendants are Carlisle & Jacquelin, DeCoppet & Doremus (referred to collectively for convenience as the "brokerage firm defendants") and the New York Stock Exchange. The essence of the action is the allegations that the brokerage firm defendants have monopolized the odd-lot business of the New York Stock Exchange and have conspired to fix an excessive odd-lot differential (the odd-lot differential being the extra amount charged when a transaction on the stock exchange involves fewer than 100 shares) in violation of the antitrust laws of the United States. It is further alleged that the New York Stock Exchange knew of these wrongs but permitted them to occur. Defendants have denied all the material allegations of the complaint and have denied any wrongdoing whatsoever. The issues of whether any of the defendants are liable and the extent of such liability are complicated and have not yet been determined by the Court.

Since it would be impracticable to return to each member of the class his precise damages the Court has ruled that any recovery, to the extent not asserted by members of the class, will be offset against the odd-lot differential charged in the future.

If you are a member of the class you may be excluded from the class if you so request in writing by [a given date]. A judgment in this case, whether favorable or not, will include all class members who do not request exclusion. Any member who does not request exclusion may, if he desires, enter an appearance through his counsel. You should be advised, however, that if you do choose to be excluded

from the class you may be prevented from bringing your own action because of the running of the statute of limitations.

If you choose to be excluded from the class or if you desire to be represented by your own counsel, please notify the Court by writing to: The Clerk of the Court, United States District Court, Southern District of New York, Box ————, ———————— Post Office, New York, New York.

EXTRACT OF TRANSCRIPT OF RECORD OF PROCEEDINGS DATED MAY 17, 1971 (PAGES 5 TO 8).

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(5) I would say secondly that it seems to us that the notion of a hearing on the merits for the purpose of deciding the allocation of cost of notice is a procedure (6) which, so far as I know, has not yet been passed upon by the Court of Appeals and we believe that it is in conflict with the opinion of the Court in this case.

I would say further that the notion of a hearing on the merits which both sides would of necessity have to present a pretty full case, because your Honor pinpoints out that after this hearing the motion for summary judgment might be in order. I don't think this is going to be a simple matter and we also have the problem of discovery in advance.

The Court: May I interrupt you there?

Mr. Jackson: Yes, sir.

The Court: I thought about that because I anticipated that you would raise that point and perhaps I didn't make it precise enough in my discussion in that already frighteningly lengthy last opinion of mine. But I will be completely blunt about it. I meant to say then and I certainly mean to say now that the burden is on the plaintiff, as I see it, in this mini-hearing, if we use that phrase, and that the defendants are in a very good position if they chose to see it this way in not having any burden at all.

In other words, even if the plaintiff, if you were to accept me at my word and just sit down and say (7) nothing, maybe cross-examine somebody if they are going to produce a witness a little bit, but if you produce no evidence whatsoever, you would be in the very fortunate position of not

being out of court even though you produced no evidence whatsoever.

Mr. Jackson: Well, I think, your Honor, that is not the whole story, because plaintiff has a very diligent and resourceful counsel and there is bound to be discovery which will take a good deal of time in preparation.

The Court: I don't think necessarily I am going to open the door to the greatest and most exhaustive—I am well aware that the holy right of discovery transcends everything else. It has become much more important than trials in my judgment from what I see around here. People exhaust themselves financially and every other way with discovery and when they come to the trial it is very thin gruel, indeed. But I intend to have some control over that. I don't want to see you waste a lot of money and time on that and I don't want to see Mr. Eisen and Mr. Rosenfeld waste a lot of money on that.

I think what could be done is very manageable. Now, I don't mean to say it will be totally easy and, of course, that would be an exaggeration the way other. But, (8) please, I would not tolerate a length [*sic*] adversarial trial under the label of a Dolgow hearing or a mini-hearing. I just think that would be egregiously unfair to everybody.

Mr. Jackson: But I think I should also point out our basic difficulty with this proposed procedure. It is not alone the possibilities of a substantial hearing and substantial discover [*sic*], unless your Honor controls it, but it seems to us that the basic point for which the hearing is to be held, i.e., to decide whether it is possible to make the defendants pay all or any part of this notice, is a very root question of law and that we would—

The Court: I can see that because of the fact that I attempted to cope with in mine and which you know just as

well, if not better than I do, that in Eisen 2 there is that flat statement by the Court of Appeals, even thought [*sic*] I read some other statements of their's postating that opinion to be quite different, there is the flat statement in our case in which they seem to say that the plaintiff should bear the burden of notice.

Mr. Jackson: Exactly. That's our point.

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TRANSCRIPT OF RECORD OF PROCEEDINGS DATED FEBRUARY 9, 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

February 9, 1972
2:15 p.m.

Before:

HAROLD R. TYLER, District Judge.

Appearances:

Mordecai Rosenfeld, Esq., Attorney for Plaintiffs, and Harold E. Kohn, Esq., By: Aaron M. Fine, Esq., and Allen D. Black, Esq., of Counsel.

Messrs. Carter, Ledyard & Milburn, Attorneys for Defendant Carlisle & Jacquelin, By: Devereux Milburn, Esq., and Louis L. Stanton, Jr., Esq., of Counsel.

Messrs. Kelley, Drye, Warren, Clark, Carr & Ellis, Attorneys for Defendant DeCoppet & Doremus, By: Bud G. Holman, Esq., of Counsel.

Messrs. Milbank, Tweed, Hadley & McCloy, Attorneys for Defendant New York Stock Exchange, By: William E. Jackson, Esq., and Russell Brooks, Esq., of Counsel.

The Court: Why don't we start with Mr. Rosenfeld and we will see what happens here.

Why don't you make your submission now.

Mr. Fine: We have prepared the exhibits and these conform to your statement on the record of November 5 in

which you said, "I am going to rule now that from the plaintiffs' point of view I will accept a submission of the study, including any transcripts of testimony of officers or agents of the odd lot defendants," and then Mr. Rosenfeld indicated, a little later on, that, "we plan to offer, also, other sworn testimony not only of partners or employees of the odd lot defendants but of co-conspirators, "and we have prepared a list of nine exhibits for submission in the plaintiffs' case, the first of which is the SEC special study."

I must apologize. We only have a xerox of this. The volume itself is out of print.

The Court: That is all right.
Do you have a list of all these?

Mr. Fine: Yes. I will submit the list and Exhibits 2 through 9 are depositions taken in connection with the study of Carlisle Partners, DeCoppet Partners, individuals employed by one or the other of those companies, and individuals in other exchanges or other odd lot dealers.

This is the list, and I would hope that they could be marked seriatim by the Clerk, 1 through 9 in conformity with that list.

Mr. Jackson: I assume, Mr. Fine, if I may, your Honor, that these documents are those which were listed in Mr. Rosenfeld's letter of November 18? In other words, the transcripts are identical with those therein described.

(Plaintiff's Exhibits 1 through 9 marked for identification.)

Mr. Fine: I may say, your Honor, that long ago we told the defendants before this hearing was set, that these transcripts were all available for their inspection and I assumed they had their own copies because they did not take us up on that offer.

In addition, your Honor, we intend to rely on a number of documents which the defendants have said they are going to introduce in their case, and we didn't want to introduce them in our part of the case because they would simply duplicate exhibits and they are all going to be part of the record.

The Court: All right.

As Mr. Jackson inquired and I didn't hear the answer, I also assumed that really what the plaintiffs are submitting is what is described essentially in the letter of November 18th of Mr. Rosenfeld.

Mr. Fine: I believe so. It includes the individuals who are listed in the letter. It may not include all of them. In other words, I think we have reduced our offer.

The Court: In other words, there may be some depositions in there or transcripts of examinations of witnesses by the Commission that you don't include?

Mr. Fine: That is right. We didn't want to put everything in.

That would conclude our submission.

The Court: All right.

Now, of course, Mr. Stanton and others wish to reserve their rights to object to all or part of this, as we know from his letter of November 24, 1971.

I think, Mr. Stanton, this problem has already been reached and passed, but let me point to your first paragraph, numbered 1.

I am inclined to accept it just about as how you put it. I have always understood that all that would be done here would be to take what in effect amounts to offers of proof from both sides in this mini hearing, with the full understanding and expectation that some of this evidence might

neither be offered at a plenary trial, if such were ever held; or, if it were offered, would not be admitted under then current rules of evidence, and I don't think there should be any doubt about that.

I think you put it very neatly. I have tried to say the same thing, but I don't think I have said it as neatly as you have in paragraph 1.

Mr. Stanton: Thank you, sir. I had more time.

The Court: I think the record should be clear about that. I regard this so-called mini-hearing as somewhat sui generis.

Let's face it; it is not a thing that I, at least, am familiar with heretofore in the conduct of litigations in these courts; but I think the same can be said with respect to your experience. So as long as that is enunciated, I think that ought to take care of the matter.

I don't think the plaintiffs' side ever misunderstood this in any way.

Mr. Rosenfeld: We understand that they have whatever rights they have to object at such time as there is a hearing. They are not waiving anything by going through this hearing.

The Court: I want that clearly understood.
Neither are you.

Mr. Rosenfeld: Absolutely.

The Court: Is there anything else you want to add to that, Mr. Stanton?

Mr. Stanton: With respect to the balance of the plaintiffs' offer, your Honor, I would simply hand up the letter of November 24, 1971, from myself to your Honor—

The Court: I have that.

Mr. Stanton: —with the written statement of objections and now urge those objections, continue to urge them, and assert the provisions there expressed.

The Court: I'm going to view these as matters going to the weight of these various depositions.

As you point out, and accurately, I'm sure, a great many of these depositions were really not depositions in the classic sense of that word as used by us lawyers. They were recorded interviews more than they were depositions, in last measure taken by representatives of the Commission's staff.

This means, among other things, that certain of the defendants in this case didn't have anybody present and knew nothing about it at the time.

It means that certain persons were examined who though perhaps an employee of one or more of the defendants were not managing agents or officers whose testimony could be regarded as binding that particular party.

I think I should and will recognize those factors, but I'm not going to use them as an absolute bar to keep the transcripts out, because I think we are not really trying to determine the truth of the merits of the case at all, we are trying to do something quite different, as I see it: to get a broad overview preliminarily; to see, for example, whether or not there might be sufficient merit to the trial or other resolution to allocate expenses. That is what we are trying to do, as I see it.

So what I'm going to do is take your paragraph 2 and keep it with me as I read this material and factor it in. It may make a great deal of difference in certain instances.

Mr. Stanton: I think your Honor has perhaps already dealt with paragraph 3, and so it leaves—

The Court: That is right. I hope that I dealt with that long ago. I think either you or William Jackson raised this

in one of our proceedings late in the fall and I tried to say then that I quite agree that no one should be bound by anything that happens in our mini-hearing as constituting any rulings on evidence which might come up at trial.

Mr. Stanton: If I could, your Honor, I would urge upon you once more the thought contained in the last paragraph of the letter and ask that it be marked for identification.

The Court: Yes. That, of course, gentlemen, is the continuing exception which the defense has stoutly maintained all along, to my knowledge; that they object to the whole concept of the mini-hearing.

Mr. Stanton: Perhaps if we mark the letter, then, since we have discussed it on the record—

The Court: I don't mind marking the letter, but I deem it part of the record.

Let's just say that I deem the November 24 letter of Carter, Ledyard & Milburn by one of its members, Louis L. Stanton, Jr., to be part of the record of our hearing.

Now, Mr. Jackson, I gathered you were going to do the laboring for the defense table.

Mr. Jackson: Yes, insofar as the documents are concerned, your Honor. I have two bundles of documents, which I should like to offer for marking, individually, as defendants' exhibits.

And these are the documents which I described in my letter of December 31 to Mr. Rosenfeld, a copy of which was sent to the court.

That letter describes 17 separate documents, copies of which were subsequently furnished to Mr. Rosenfeld.

It includes the "odd lot" cost study of 1964 by Price Waterhouse, which your Honor has heard something about, and it includes other letters relating to that study, relating

to the position of the Anti-Trust Division on the merger of the two firms here involved which we think has a bearing on the issues; various other documents, some of which is correspondence of the Securities and Exchange Commission, and also including minutes of Securities and Exchange Commission which we think demonstrates the absence of the claim of conspiracy alleged and also evidences active regulation by the Exchange in accordance with its statutory duties.

With that brief word of explanation as to what these documents are about, and without burdening the court with reading from any of them at this point, I should like to offer those 17 documents and suggest that the copy of my letter which I referred to be marked for identification as an index to the documents.

The Court: I have that in front of me, a copy of your letter of December 31, 1971, addressed to Mordecai Rosenfeld and I think we should deem that part of the record here, too.

Mr. Jackson: Very well, sir.

(Defendants' Exhibit [*sic*] A through Q marked for identification.)

Mr. Jackson: In addition, your Honor, on behalf of the defendants I should like to offer the 19 separate documents described in my letter to Mr. Rosenfeld of February 7, a copy of which, unfortunately, was not sent to your Honor.

The Court: I was going to say, that is what I didn't remember seeing.

Mr. Jackson: If I may hand it up, here is a copy for your Honor.

Copies of those documents have previously been furnished to Mr. Rosenfeld.

I should like to ask that they be marked seriatim, commencing with Exhibit R, please, and perhaps the copy of my letter of February 7th could also be deemed a part of the record for index purposes.

The Court: Yes. We will take my copy, which you just gave me, and deem that a court record document.

(Defendant's [*sic*] Exhibits R through AJ marked for identification.)

The Court: That completes the defense submission?

Mr. Jackson: Yes, sir, it does, your Honor, as far as we are concerned.

Mr. Holman: Your Honor, a housekeeping point.

I note that plaintiffs have left two sets of their exhibits on the defense table but there are three defendants. Could Mr. Rosenfeld ship another copy of their exhibits to us this week?

Mr. Rosenfeld: We will do that, your Honor. We just didn't carry over that many copies.

Mr. Holman: Send it to my office and we will leave the other two defendants to take the copies you have left here.

The Court: What do you claim all this shows, Mr. Rosenfeld, or Mr. Fine?

Mr. Fine: If your Honor please, it is the plaintiffs' position that this makes a very strong showing of liability on the part of the "odd lot" defendants and on the part of the Exchange.

The strong showing that we already had at the conclusion of our offer has been fortified by documents which the defendants have put in.

For example, I think one document they put in describes the plaintiffs' case in a nutshell. That is the letter of September 17, 1969 from Mr. MacLaren [*sic*], the head of the Anti-Trust Division, to Mr. Budge, chairman of the SEC, and on page 2 in a footnote, he gives as the opinion of the Anti-Trust Division that "historically, the 'odd lot' differential rates have been fixed by agreement between Carlisle and De Coppet, who together have put pressure on regional exchanges and others not to deviate from them."

This is the price-fixing aspect of the case as to which I think, frankly, there is no defense. I think it is a documentary case, the kind of documentary case which the Supreme Court, for example, in an Anti-Trust decision, which we will cite in our brief, the Krusnoff case, held that summary judgment for the plaintiff was proper.

Mr. McLaren goes on in this letter to describe how the "odd lot" defendants had deliberately held back any kind of automation which would have reduced the costs that were imposed on "odd lot" traders and even in 1969 was expressing doubts that they would do anything about it.

Now, that is the anti-trust, price-fixing part. You also have the pressure on others to prevent any competition. You also have the holding back of cost reduction, and automation.

All of this is spelled out in documents, not only in the special study but in documents that the defendants themselves have put in and which I think they would have to admit, for example, if we were before you on a summary judgment motion, on requests to admit.

The other aspect of the case is clear. It is also clear from the documents that neither the New York Stock Exchange nor the SEC did anything during the period involved in this suit to regulate the "odd lot" differential.

For example, another document the defendants have introduced, minutes of the SEC itself of January 23, 1951,

in which Mr. Hanrahan was appearing for the two "odd lot" firms to sound out the SEC on a proposed joint increase in the "odd lot" differential—and these minutes say Mr. Hanrahan, who was counsel for the "odd lot" dealers, stated that, "The New York Stock Exchange was of the view that it had no jurisdiction over the differential to be charged by 'odd lot' dealers in executing 'odd lot' orders," and this goes on, "The director"—and this is the SEC—"of Trading and Exchanges stated that he doubted whether the Commission had jurisdiction in the matter."

However, he pointed out that § 11 of the Act conferred upon the Commission certain powers over "odd lot" dealers, and that § 19 of the Act, relating to the Commission's powers with respect to national securities exchanges and securities gave the Commission authority to request exchanges to alter their rules in respect of various matters, including "odd lot" purchases and sales.

"The director also pointed out that all of the national securities exchanges except the New York Stock Exchange had rules relating to 'odd lot' dealers; that some years ago, and again a few months ago, the staff had requested the New York Stock Exchange to consider the advisability of adopting rules relating to 'odd lots' but that the Exchange had not taken any such action to date."

So that, here you have them jointly fixing the rates and you have a disavowal by the Exchange of any jurisdiction over the rates, a disavowal which continued, by the way, into 1965, when the amendment to the registration statement which the Exchange filed in that area with the SEC said that the "odd lot" differential was that imposed by the "odd lot" dealers.

Now, it is true that after the special study there were various studies that were put in motion, but until the

middle of 1966 the "odd lot" differential and rate as imposed by the "odd lot" dealers without any regulation, remained in effect; and finally in 1966 the SEC delivered a letter to the Exchange, June 16, 1966—again this is a document introduced this afternoon by the defendants—containing this language:

"The Commission hereby makes written request, pursuant to §19B of the Securities and Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of 'odd lot' purchases and sales and the fixation of reasonable rates of commission and other charges in connection therewith to fix odd-lot differentials so that on 100-share unit stocks the differential on stocks selling for not less than 55 shall not be more than a quarter of a point, and on stocks selling below that point but for more than 5/32nds, the differential shall not be more than one-eighth of a point."

And as a result of that, which is the first time that the SEC really assumed jurisdiction and asked the New York Stock Exchange to assume its responsibility for regulation which it had completely neglected before that, as a result of that, according to another exhibit which the defendants have put in, that is, the report of the Special Committee on "Odd Lots," June 14, 1966, there would have been a saving by their calculation during the period in suit of $5 million a year to the "odd lot" traders.

So that you have here, apart from any question of whether there is an immunity defense, which I shall come to, you have a classic case of price-fixing as to which the cases are clear that there is no defense. It is a per se violation and the only possible defense in this case would be that of some kind of immunity.

But I think it is clear from the Supreme Court's decision in *Silver* and the decision of the Second Circuit in the

Thill case that there is no immunity here because, first of all, there wasn't even a pretense of regulating this rate by the New York Stock Exchange and if the Stock Exchange had undertaken its duty and discharged it, of course we would have had the results at the very minimum which were calculated after it did do something in 1966.

I think that it cannot possibly be said on this record, where there was no supervision, that the *Silver* test could possibly be met, and that is that Exchange activities are exempt from the anti-trust laws, and then this is a quotation from the Supreme Court decision:

"Only if necessary to make the Securities and Exchange Act work, and even then only to the minimum extent necessary."

And, of course, in *Silver* and *Thill* you had a situation where there had been some rule which was adopted regulating the activities involved in those cases.

Here, where you had no rule, whereby statements made by the Exchange itself, as well as by the odd-lot dealers—they had deliberately abdicated any statutory obligation to regulate the rate—I don't see how they could possibly come within the immunity defense.

So that you have a per se violation. Since it is a price-fixing case, of course, the plaintiffs and the class have to show, before they are entitled to recovery, some injury and damages, but I think that we have enough evidence so that we can say there is clear injury and damages to the class within the applicable decisions, the *Bigelow* case in the Supreme Court, Judge Feinberg's decision in the *Electrical* case, which he tried, the *Ovec* case, where you can take the situation before and after and compare them and see what the difference was, and here it amounts to at least $5 million per year, and there are also other decisions, I think *Union Carbide* may be one, and others,

where the courts have held that where you have a price-fixing violation of long standing from the very existence of it you can presume that there has been injury and damages.

So that, first of all, on the count of the complaint against the odd-lot dealers you have a strong showing and I think we could with very few additional documents from the defense make out a summary judgment showing of violation of the anti-trust laws, and I think we can also make a similar showing with respect to the New York Stock Exchange's failure to fulfill its duty of regulation within, for example, the principles of Judge Gurfein's recent decision in the Weinberger case.

Now, all of this, of course, bears on the issue before the court, which is who should pay the cost of notice, and there was a discussion in Judge Weinstein's decision in the *Dolgow* case that if the plaintiff could make a strong enough showing of liability the cost could be put on the defendants.

There are cases where the cost has been put entirely on the defendants. There is one in this District, the Bragalini case, and I think there is one which we will add to our brief that was just decided by Judge Lasker.

You suggested, your Honor, in your opinion that we might make analogies to various other situations; for example, what the plaintiff might have to do in posting security on a preliminary injunction.

There are cases which we will also cite in our brief where the court has been held to have the discretion to dispense with any security even in the preliminary injunction situation.

There is also the analogy of progressive statutes in various states in stockholder litigation where if the plaintiff makes a strong enough showing at a preliminary hear-

ing on liability, he has to post no security under the State security statutes.

There is also the principle of the case of Mills against the Electric Auto Lite Company in which the Supreme Court held that if you make a showing of violation of the proxy provisions of the Securities and Exchange Act even before you go on to prove that there was any injury or damages resulting from the violation, the plaintiff would be entitled to an award of costs and counsel fees.

There is a recent decision in our District in Philadelphia, the Eastern District of Pennsylvania, the case of Bright against the Philadelphia-Baltimore-Washington Stock Exchange, where it was found that the Exchange had violated a statutory duty, and as a result of the finding the judge said that under the principles of Mills he would impose costs and counsel fees on the Exchange.

I think we have a similar situation here, and that is we can show by the documents put in by the defendants themselves, as well as the special study that the Exchange has violated its statutory duty of regulation. It really abdicated that duty, was completely derelict in what it should have been doing, and finally, when it did do something, the results were evident. So that under the Mills principle as followed in the Philadelphia-Baltimore-Washington case, I think that is another basis on which the court could impose the costs on the defendant, the Stock Exchange, and equally on the anti-trust defendants.

Now, I'm reluctant to mention another ground on which we would urge, your Honor, that it would be appropriate to impose costs on the Exchange because I know you have already ruled that there was no settlement here. But, on the other hand, it has been our position that there could have been a settlement if it had not been vetoed by the Board of Governors of the Exchange.

We asked the defendants to let us have something that we could put into the record, the minutes of the two meetings where we believe that took place, and we asked them again this morning if they would have those minutes in court, but they declined to produce them and we think that if the minutes do show that the settlement was frustrated by this veto of the Stock Exchange, it would be an appropriate ground on which to base a ruling that the Exchange ought to bear the cost of the notice, because obviously—

The Court: You mean alone?

Mr. Fine: I think so, your Honor, because you have already found that the other defendants didn't make a settlement, but if that was because the Exchange had interfered with the settlement, I think it would be equitable for the Exchange, for that very reason, to bear the cost of notice alone, and we urge that upon your Honor because in these class actions which are settled, of course, the cost of notice is readily paid out of the settlement fund.

I would like to touch on the subject of summary judgment. I know that in your opinion you said that you were reluctant to deal with that situation prior to the sending of whatever notice is determined as appropriate for sending to the class, but since that decision there are two cases I know of in which class actions summary judgment has been entered for plaintiffs prior to the sending of the class notice.

The Court: That may well be, but if I can interrupt, you recall we have a somewhat sui generis problem here. It stems from the Court of Appeals' second opinion in this case which remanded the matter here for further hearings on the class action determination issue and they said, as I understood them, and still understand them, that they were somehow retaining jurisdiction of this question, a matter

which I have had occasion before to raise some questions as to what that really means, but be that as it may, one of the things it means to the defendants, as you certainly know from your friend and co-counsel, Mr. Mordecai Rosenfeld, is that they intend to jolly well get back up on Appellate Review and, indeed, have already tried, unsuccessfully, for the moment because apparently the Court of Appeals agreed with my view that we'd better decide the cost allocation before they get upstairs.

So this is a little bit special, as I see it, or at least I can see good reasons why those cases you have properly called to my attention—I don't know which ones you refer to, but I know there have been cases where summary judgment has been granted prior to notice going out under Rule 23.

Mr. Fine: I am simply suggesting, your Honor, that it would be a proper part of such a record to go before the Second Circuit, if summary judgment were appropriate, that it be considered and granted because in deciding who should bear the cost of the notice, the question of summary judgment is a proper standard within the decision of the Supreme Court in the *Mills* case, and it might save time all the way around if indeed, as we submit, the plaintiff is entitled to summary judgment certainly on the price-fixing part of the anti-trust case and on the application of regulatory responsibility on the count against the Exchange that would be most material, I would think, for this Court and for the Second Circuit on any appeal that it might entertain to consider because that might dispose completely of the question of who should pay for the notice.

The Court: Of course, as you are implying in this submission, and I'm inclined to sympathize for you, the tragedy is that there has been much water gone over the milrace since the Court of Appeals wrote what I think is

usually called Eisen II, at least by this judge—I don't know about anybody else—and we are all a lot more educated than we were in those days, but I think probably my own view is that we have got to stick to what this Court of Appeals said—it is the law of the case—and I want to get this cost allocation problem out of the way and then, of course, if you want to move for summary judgment, why you certainly may.

Mr. Fine: Then I will rest on that point by saying that I think we will be able to persuade you in our brief that this is a case which would have been appropriate for summary judgment on the issue of liability from the plaintiffs' standpoint and that therefore that is a consideration in directing that costs be paid by the defendants.

Of course, you still have the situation where Eisen is a single plaintiff with a small stake and any imposition of costs on him would be a great burden for him to bear, and in this kind of situation, where the showing of liability is so strong, we would urge you to follow those cases where costs have in fact been put entirely on the defendants.

Now, I know there is some language in the Second Circuit opinion which seems to indicate that the plaintiff should bear the costs, but I have looked at the briefs in the Second Circuit. It was never argued that the defendants should bear the burden, and the law has developed in a great many cases since then.

The Court: Right. And they themselves have had quite different observations in subsequent cases.

Again, I think in fairness to them we have got to recognize as to that opinion that it was at a comparatively early stage under the amended rule and they had not had occasion to focus upon the problems in this area to the extent that, of course, they and other courts now have had over the years.

I don't know, but perhaps they might still take the same view. I don't know. That is their prerogative. But all I'm saying, of course, is the obvious. I covered that, as you know, in my last substantive opinion.

Let me just ask you one thing:

I gather from what you say, you want to submit another brief.

I cringe for your sake and all of our sakes. On the other hand, I suppose that it might make some sense to do it, even though I hate to see more time go by.

What would you like to do? Let's start that way.

Mr. Fine: We can submit a brief by next Friday, and if our office multilith machine were not involved in another class action it might be by Wednesday—I mean, Friday of next week.

The Court: Friday a week, the 18th.

Mr. Fine: Yes.

The Court: May I suggest something that I think might reduce your efforts in time, and correspondingly, the defendants' efforts in time, and I think would be certainly acceptable to this Court and myself as a representative of the court, and that is this:

Just a very summary exposition, really just fleshing out a very little bit what you have articulated this afternoon, which I thought you articulated so that I understood you, and one way of doing it would be to say: we believe that this record establishes that plaintiffs make a case of price-fixing, per se price-fixing, see exhibits, in particular numbers blah, blah, blah and blah blah.

Do you see what I mean?

And then all the rest, and just key it that way.

The Court: I think that would really be sufficient; and then, of course, when you want to anticipate any immunity

defense, for example, you can cite *Silver* and I know all about Silver because I have been talking about it in the last opinion. But, nevertheless, there is no reason why you can't key it that way, too.

Does that sound like a relatively simple and sensible way to proceed?

Mr. Fine: Yes, sir.

The Court: All right. That is perfectly fine. I am delighted with your suggested time, too, Friday the 18th.

Mr. Fine: Thank you.

The Court: Now, Mr. Jackson, I would suppose that from what you and your colleagues have been saying, that you would like to submit something, too?

Mr. Jackson: Yes, your Honor. And I would also like, if your Honor would permit me, the privilege of responding as briefly as I can.

The Court: Yes, I intended to; but while we are on this administrative matter of time, and what you would like to submit in writing, why let's clear that up as to what you would like to do.

Mr. Jackson: We would like time to respond to Mr. Fine's brief.

The Court: How about the 25th of February, one week thereafter, along the limited lines I have tried to sketch out, which I assume basically you understand?

Mr. Jackson: I think it would be rather difficult to do it in less than two weeks, your Honor.

It has just been pointed out that there is a holiday intervening.

Mr. Fine: Perhaps we could make our submissions on the 18th and both reply—

The Court: I was going to say that particularly if Mr. Fine and Mr. Rosenfeld stick to this somewhat reduced type of brief that I was endeavoring to describe, I see no reason why the defense couldn't put in the same thing, particularly since you know basically what their argument is, anyhow.

I really don't want to prolong this any more than I have to. I know you are busy people.

I think that what I will do is to direct that both sides put in a brief, as brief as you can make it, along the lines I suggested, on the 18th with full reservation to either side to phone my chambers and say, "well, he has said something that really I must answer," and then they will just agree on a simple letter answer, or whatever.

So February 18 for both sides.

All right, now, while you are on your feet you certainly have the floor to respond to these charges against the New York Stock Exchange.

Mr. Jackson: If your Honor please, I don't intend to go into this in any detail, at this point.

The Court: Surely.

Mr. Jackson: There are a few high points, perhaps, that I would like to mention.

In the first place, the suggestion that the matter which I thought was closed, this business of a settlement, should be dragged out on the issue here presented seems to me to be preposterous.

It does not follow, in my way of thinking, that just because the costs of notice to the class where there is a settlement are borne by the defendants, that they should be borne by the defendants where the defendants refuse the settlement. It just doesn't make any sense.

As to the suggestion that the criteria for summary judgment might be in any way applicable on this mini-

hearing, I think my learned friend has overlooked the guidelines that your Honor laid down sometime ago as to this hearing.

While I can't quote them from memory directly, I think I have the substance in mind when I say that your Honor directed that on this mini-hearing the plaintiff had the full burden and that the defendants could sit back and perhaps they could do nothing whatsoever; and I think that that should be the proper standard as your Honor laid it down.

The Court: Let me just pause there.

Accepting that essentially, I don't think that Mr. Fine's argument is quite answered by that.

What I think he is really saying is now that they have made their submission on the mini-hearing, they are inclined to think that, with the possible addition of some more documents they really have enough upon a motion for summary judgment. That is the first part of it.

And the second part—and Mr. Fine, you correct me if I am wrong in my description of my understanding of your argument, Mr. Fine would then say that if that is so, it carries a powerful weight or argument to the effect that plaintiffs have certainly carried their burden here at this mini-hearing and they have carried that burden sufficient to show that the defendants should pay the whole cost.

Isn't that a rough but fair summary of your position?

Mr. Fine: A very fine summary of it.

The Court: All right.

Mr. Jackson: I think that perhaps if when the court examines some of the documentary material which we have offered this afternoon, that this statement of counsel may turn out to be a little optimistic.

The Court: That could be.

Mr. Jackson: However, I think the basic point to be borne in mind, your Honor, is this:

Since October of 1966 the "odd lot" break point has been fixed uniform for all firms acting in the odd-lot business by virtue of the order of the United States Government.

The documents which we have put in show that the Securities and Exchange Commission sent the Exchange what is know as the Section 19B letter in June of 1966, requesting that the Exchange change the odd-lot break point.

Now, that request was not just a polite little formality. It was a request which had the force of law under Section 19B of the Exchange Act, because had the Exchange declined to comply, the Commission was authorized by the statute to compel the Exchange to comply, and the Exchange in October of 1966 did comply and it changed the odd-lot differential by rule to accord with what the SEC had requested it under threat of statutory compulsion to do; and I submit to your Honor that it is fundamental that activities undertaken by order of the government cannot constitute a basis for an anti-trust claim; and secondly, that the Exchange's action in changing its rule at that point certainly amounted to regulation within the meaning of the Exchange Act because it was acting at the express behest of the Commission. So that I think the starting point is that there can't possibly be any claim under the anti-trust laws or under the Exchange Act for anything that occurred after October of 1966.

Then the only question is whether there is any colorful claim with respect to activities prior to that date which fall within the four-year statute of limitations under the anti-trust laws or probably the six-year statute would be applicable to the claim against the Exchange.

As to the anti-trust claim, I, of course, cannot speak for the "odd lot" house defendants, but I can say a few things, which they may disagree with or wish to add to.

In the first place, Mr. Fine's argument about price fixing and per se violations of the anti-trust laws is a very interesting argument when it is limited to the industries which were involved in the cases which he is talking about.

This case is not a case that can be at all analogized to a conspiracy among steel mills or steel companies to raise the price of plate or to fix the price of plate, or bakeries to fix the price of bread, or gasoline manufacturers to fix the price of gasoline, because this is a regulated industry. It is regulated in two ways:

First, by the Exchange as a self-regulator, carrying out historic duties granted to the exchanges of this country under the common law and carried forward under the Exchange Act.

And secondly, it is regulated by the Securities and Exchange Commission, pursuant to a very intricate and unique statutory pattern set up in the Exchange Act.

So that the per se cases of price fixing just don't apply, as was established beyond question by the Seventh Circuit Court of Appeals in the Kaplan case, in which it was held that the Exchange's minimum rules of commission did not constitute a per se, indeed, did not constitute any violation of the anti-trust laws by virtue of the existence of an SEC oversight under the pattern of regulation established by the Exchange Act, and certiorari was denied in that case.

In this case we have what in effect has been a rule of the Exchange since the time that the Exchange was first registered as a national securities exchange in 1934.

Included among the documents submitted to your Honor by defendants are the original registration statement of the Exchange and the annual amendments thereto, in which

the Exchange was asked to respond to this question, in effect, "do you, Mr. Exchange, have any rules or any practices amounting to rules governing the odd-lot business?"

And the Exchange in each case replied, "We do. We have settled practices under which we permit odd-lot business to be done at the differential established by the odd-lot dealers."

And we think that those facts, coupled with pertinent provisions of the Exchange Act itself, show that while the practice was called a practice, rather than a rule, for regulatory and for anti-trust purposes it had the effect of a rule of the Exchange governing the odd-lot business.

Now, I would go further and say that even if this was a case where there was not a defense of immunity from the anti-trust laws, there certainly is a defense of the rule of reason, and this was recognized by the Supreme Court in the Silver case, in which it pointed out that even though there might not be an immunity for a certain exchange activity under the aegis of the rule of reason, the exchange should be granted sufficient breathing space so that its regulation could be effective and not thwarted by anti-trust lawsuits.

I don't want to enlarge any further on the anti-trust aspects, because the Exchange is not a defendant on that charge. And let me now just turn for a moment to the charge the Exchange failed to regulate the odd-lot business.

As I have said, commencing in 1934 the Exchange advised the SEC annually that it had practices, settled practices, amounting to rules governing this business.

Well, that wasn't all. In 1938, for example, in a document dated November 1938, entitled, "The Odd-Lot Dealers' System," a copy of which has been offered by defendants today, the Committee on Court Procedure in the Exchange addressed itself very specifically to the question

of the differentials at which odd-lot dealers should do business, and the Committee came to the following conclusion, which is expressed on page 3 of that document:

"The Committee does feel, however, that the differentials in which odd-lot dealers do business should be the same."

This is the committee of the Exchange.

"The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of the members. The Committee believes it is preferable that the Exchange avoid fixing all odd-lot differentials. The present differentials are not felt subject to criticism. The difference in the differentials is the thing to which objection is taken. Accordingly, the Committee feels that the appropriate action to take is under its power to withdraw its approval of any member acting as odd-lot dealer, Rule 248: 'To withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted.'"

Now, between 1938, the date of that report, and 1951, there are a number of communications in documents which we have offered which show a consistent pattern of consultation between the Exchange and the SEC with respect to the various problems which arose regarding the conduct of the odd-lot business in which the Exchange was acting.

The Exchange was consulting with the Commission and the Commission not once said, "Don't do it."

Then we come to 1951, when there was a feeling, apparently, that an increase in the odd-lot differential was warranted, in view of generally increasing costs. The odd-

lot firms and the Exchange took this matter to the Securities and Exchange Commission.

The Commission considered the matter and it functioned on it, and at a meeting held on January 21, 1951, at the Commission, the minutes of which we have offered this afternoon—there were certain conversations which Mr. Fine read to your Honor from the minutes, but he stopped with a conversation and I'd like to read to your Honor the last paragraph which, after all the conversation gets down to the position. It reads as follows:

"After due consideration the Commission took the position and so advised Mr. Hanrahan"—who is representing the odd-lot firms—"that apart from the jurisdictional question which the Commission was not deciding at this time, the Commission had no objection to the present proposal for an increase in the odd-lot differential and would take no action if the firms of Carlisle and Jacquelin and De Coppet & Doremus should proceed for such increase."

If that isn't regulation, I don't know what regulation is.

And then we come along to 1963, when your Honor recalls the special study made certain recommendations with respect to the odd-lot business.

Very promptly thereafter, as the exhibits we have offered this afternoon show, the Exchange and the Commission together got to work to try to implement those recommendations and together they decided what matters should be encompassed by the Price Waterhouse study.

Together they reviewed the drafts of that study. Together they directed the progress and the direction of that study and eventually that study became the basis for the Commission's direction to the Exchange to make changes in the break point which the Exchange thereupon put into effect.

Now I think this brief capsule of some of the evidence that we have offered this afternoon, your Honor, should be sufficient when supplemented by a review of the documents themselves, and our brief, to convince your Honor that it is the plaintiffs here who don't have an appreciable chance of prevailing and should bear the cost of notice.

The Court: Let me just ask you about that last point, Mr. Jackson.

What really this, in part, comes down to is your client's position that this was a regulated industry and that if we take the period prior to October 1966, it was even sufficiently regulated there so that you would get around the kind of thing discussed by the Supreme Court in the *Silver* case, and so on.

Is that right?

Mr. Jackson: That is right, your Honor, as regards the anti-trust.

The Court: In other words, this really is an immunity situation?

Mr. Jackson: No, I say it is two things. It is immunity—I think if it isn't immunity it certainly is rule of reason, and we think, also, that the same reasoning leads to the conclusion that the Exchange was not derelict in its duty of regulation under the Exchange Act.

The Court: All right.

Mr. Stanton: Might I add a few words? I'll be very short because Mr. Jackson has covered it so admirably.

The Court: Surely.

Mr. Stanton: I would like to mention one or two aspects that are more special to the odd-lot defendants.

Mr. Fine started by alluding to the letter by the Department of Justice to the Securities and Exchange Commission. Of course, we put that in evidence and we do so because however critical it may have been of the odd-lot houses and whether those criticisms are captious or well-founded we think is not a matter to concern your Honor very much.

That letter does recognize that the odd-lot business was at the time of its writing a natural monopoly.

The Department of Justice in that letter reviewed the proposed merger of the two odd-lot firms. It had previously studied the facts relating to that merger and it declined to oppose the merger.

This is much more significant than its remarks about efficiency or inefficiency or its exhortations to the Securities and Exchange Commission. It is a finding of a special exception—perhaps that is over-stating it—to the general application of the anti-trust laws by reason of a natural monopoly, and this, coupled with the close regulation, the close surveillance which the SEC has had on us for years and years renders the steel, tobacco and those cases quite different in their application.

The Court: On that score, I think perhaps Mr. Fine would agree with you. I don't think he is arguing that this is quite like tobacco, steel or any other manufacturing or production field. I think his point is not quite that simplistic. I think all he is saying is that this, to be sure, is an industry which is remarkably different from those and indeed it is sui generis, but he can still argue that there is a price-fixing scheme.

Mr. Stanton: If he agrees with me on that leg of my argument, I'll be most grateful.

The second leg is the minutes already referred to by Mr. Jackson of the SEC in 1951, showing approval over

a decade before any time open to Mr. Fine under the statute of limitations of the very differential charge. That, your Honor will note, is an approval given after hearing Mr. Hanrahan speak on behalf of both firms who were then able to survive independently and appeared nevertheless through one counsel speaking by one voice to the SEC.

As an additional authority to those cited by plaintiffs, I would remind your Honor of Judge Medina's opinion in *United States v. Morgan*, where in an attack under the anti-trust laws which the government, which chose not to attack or oppose a merger in this case but did attack in that case—he, Judge Medina, as you remember, discussed in masterful detail the operations of the business and found why it had to be the way it was.

I merely leave those thoughts with you on the question of liability. Strictly speaking, under the anti-trust laws there are other aspects of the case which may puzzle or provoke you.

As a matter of public record, I believe that on the regional exchanges the break point is still 40.

You may wonder why that break point, which the plaintiff here complains is on an exchange still regulated by the SEC, a legal charge today but a source of anti-trust violation and trouble [*sic*] damages to these plaintiffs.

When we turn to the question of imposing costs, I think your Honor must again, as I have, review the findings of fact at the outset of your most recent substantive opinion. These again raise the question whether there is any class at all or simply a wholly and boundlessly imaginary group.

I tremble to raise this now, but the reason I mention it is that the very purpose of a class action is to allow the litigation of small claims.

Now, it is not to make the defendants finance those claims. If the class is allowed to band together to bear

the costs of litigation, so be it. But they are surely then not in a position to say, as Mr. Fine has had the bold candor to say, that Mr. Eisen still stands alone and impecunious, at the mercy of the Court, and therefore to ask us to pay for his communicating with his own client.

These, I think, sum up some of the views that we bring to this hearing.

The Court: All right.

Mr. Holman, do you want to add anything?

Mr. Holman: I have nothing further to add, your Honor, in substance. I would in passing make note of Mr. Fine's comment about $5 million a year turning on the change in the differential.

I would think that your Honor should observe that the Justice Department in approving the merger had before it the financial situation with respect to this cyclical business and shouldn't be carried into an erroneous conclusion by that $5 million statement.

We don't accept that view. I didn't go into any great length about it. I didn't think it relevant to this proceeding.

I wouldn't want the record to leave any notions that there was $5 million involved for these companies.

Each year is different than another year. That was recognized particularly by the Securities and Exchange Commission when it approved the merger of the two odd-lot firms in 1969.

Mr. Fine: If your Honor please, perhaps we can limit the issues. I haven't heard anyone deny that whatever differentials existed and break points existed were agreed upon jointly by the two odd-lot defendants, so that I don't think that fact, which is basic to the price-fixing allegation, is one that is in any controversey.

Perhaps we can therefore agree on that.

With respect to the natural monopoly argument, it is quite clear from Mr. MacLaren's letter that he indicated that this was a natural monopoly. If he indicated that which had gone unregulated in the past and he wanted to be absolutely sure that if it wasn't going to be regulated in the future the Anti-Trust Division ought to know about it, because, "as I said, this issue would be relevant to any exercise of anti-trust jurisdiction in this area."

In other words, he was giving them a chance to do what they had neglected to do in the past, and you don't have a natural monopoly immunity if your monopoly has been achieved by practices that are violative of the anti-trust laws. And, in any event, you had here two firms, a duopoly, which were admittedly agreeing on prices; so that the price-fixing cases would apply.

Of course, the Kaplan case was overruled, I think clearly by *Thill* in the Seventh Circuit.

The Court: What is the gross figure that we computed in that last opinion as to costs for notice? Has anyone got it on the top of your head?

Mr. Holman: I believe it was $21,000, your Honor.

The Court: That sounds about right here. I've got a copy of this.

Mr. Fine and Mr. Rosenfeld, the plaintiff wouldn't argue that he is unable to put up no money at all, would he?

Mr. Fine: Well, whatever he has to put up is a burden on him. I assume—

The Court: There is no doubt about that. Even if he is a very wealthy man you can say it is some burden. But all I am seeking to find out is whether plaintiff could put up something if it were a token sum.

Mr. Fine: I would think he could put up a token sum, your Honor.

The Court: All right.

Mr. Fine: Although tokens are going up, as I found out, in New York.

The Court: Yes, indeed; they surely are.

Now, I have it laid out at pages 41 and 42. Inflation may have eroded some of the figures here. I don't get $21,000. I think it is less than that, isn't it?

Mr. Holman: That was my recollection. We had computed it after your decision. I could be wrong in that recollection, your Honor.

The Court: All this proves is that lawyers and judges are lousy mathematicians. I guess we will just have to pass that.

Mr. Stanton: Perhaps we should answer Mr. Fine's suggestion that there was an agreement on the differential. We, of course, can't accept his statement in that respect.

The documents which you have before you show a most intense negotiation between the odd-lot houses among themselves, with the Exchange, with the regional exchanges, representatives of the various out-of-town offices and, of course, the Securities and Exchange Commission at many levels and at many times before the resulting differential is arrived at.

The Court: I will look, then, to receiving your written submissions on the 18th, which is a week from this coming Friday and, as I said, if someone wants to respond briefly to something that the other side has said, he can call my chambers and we will try to work out something in short order.

I would hope that wouldn't be necessary, but I don't want to say no to that now.

All right, off the record.

(Discussion off the record.)

OPINION OF TYLER, J., DATED APRIL 4, 1972 PROVIDING THAT DEFENDANT SHALL BEAR 90% OF COSTS OF NOTICE TO CLASS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This case is currently on remand from the Court of Appeals for class action determination. In deciding whether this case could be maintained as a class action, this court was directed to consider "* * * questions of notice, adequate representation, effective administration of the action, and any other matters which the District Court may consider pertinent and proper." *Eisen v. Carlisle & Jacquelin,* 391 F. 2d 555, 570 (2d CIR., 1968). After able response by the parties to these and other issues, it was decided that this case could and should be maintained as a class action. *Eisen v. Carlisle & Jacquelin,* 52 F. R. D. 253 (S. D. N. Y., 1971); at the same time, however, decision on the issue of the allocation of the costs of notice of that status to the class was reserved. Specifically, in recognition of the fact that cost of notice as required might impose unfair burdens upon either plaintiff or defendants, it was decided to hold a preliminary hearing on the merits to determine whether, and, if so, how such costs might be allocated among the parties. In this preliminary hearing, the parties were afforded the opportunity to present evidence showing "* * * 'the likelihood that one party or the other would prevail at trial' * * *" *Dolgow v. Anderson,* 43 F. R. D. 472, 502 (E. D. N. Y. 1968). If, after the hear-

ing, the evidence showed that the "* * * chances of ultimate success of plaintiff and the class were sustained", *Dolgow v. Anderson*, 438 F. 2d 825, 827 (2d Cir., 1971), defendants would be required to pay all or part of the costs of notice. *Eisen v. Carlisle & Jacquelin, supra*, 52 F. R. D. at 272.

The "mini-hearing", as this preliminary hearing has come to be termed, was held on February 9, 1972. No oral testimony was taken, the parties preferring instead to rely on submission of voluminous documentary evidence. Argument by counsel was heard, and briefs were submitted thereafter. There follow findings of fact and conclusions of law concerning plaintiff's anti-trust and "failure to regulate" claims which are based on evidence currently before this court. They may be considered binding on the parties and court only for the stated purpose of the hearing; the allocation of the cost of notice. Thus, they may not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination.[1]

Briefly stated, plaintiff asserts that he and the class were injured by various anti-competitive practices of defendants. Specifically, plaintiff complains that in establishing differentials to be added to the price of odd-lot stock traded over the New York and other exchanges, defendants were guilty of *per se* violations of the antitrust laws. Plaintiff further complains that the class was injured by the New York Stock Exchange's alleged failure to regulate odd-lot transactions as it is required to do by the terms of the Securities Exchange Act of 1934 ("the Act").

On the basis of the evidence presently before the court, I conclude that plaintiff class is more than likely to prevail

1. Plaintiff's counsel have argued that the merits of this case can be reached on motions for summary judgment—and that the present record before the court is complete for such resolution. Even if this be true, this court declines, as stated in the text, to treat this case on the merits at this juncture.

on both of these claims and that defendants must therefore bear the major share (90%) of the cost of notice to the class.

FINDINGS OF FACT

1. The defendant odd-lot firms, Carlisle & Jacquelin and DeCoppet & Doremus (the "odd-lot defendants"), during the years 1960 to 1966 enjoyed a monopoly of odd-lot transactions over the New York Stock Exchange ("the Exchange").

2. Prior to the enactment of the Act, the differentials charged by odd-lot firms operating over the Exchange were set by agreements among the firms themselves with the approval of the Board of Governors of the Exchange. This procedure was not essentially changed after the enactment of the Act until 1966 when the Exchange adopted a rule establishing odd-lot differentials.

3. The Exchange in 1934 filed a registration statement with the Securities and Exchange Commission. In that document and in annual amendments filed with respect thereto, the Exchange described its regulation of odd-lot firms as follows:

> "Transactions in odd-lots are effected on this Exchange under methods which have been prescribed by the odd-lot brokers and dealers with the *acquiescence* of the Exchange." (emphasis supplied)

4. Prior to 1964, the Exchange had adopted five rules pertaining to odd-lot transactions. None of these rules in any way pertained to or sought to regulate the differentials to be charged in odd-lot transactions. These five rules, which can only be said to apply to peripheral matters, constituted the only formal regulation of odd-lot brokers and dealers by the Exchange.

5. Prior to its adoption of Exchange Rule #125 in 1964, the Exchange was the only national exchange not to have established rules regulating odd-lot differentials.

6. In 1938, in addition to the two odd-lot defendants, four smaller specialist firms were also transacting odd-lot business on the Exchange. These smaller firms, which at that time accounted for 2½% of all odd-lot business on the Exchange, had adopted the practice of absorbing transfer taxes in their odd-lot sales. The odd-lot defendants, who chose not to absorb these costs, complained of these competitive practices to the Exchange's Committee on Floor Practice. After confidential hearings, the Committee decided:

> "* * * that the differentials at which odd-lot dealers do business should be the same. The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of members."

The Committee then decided that henceforth it would be the policy of the Exchange to "* * * withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted." The effect of this determination, not surprisingly, was that the smaller odd-lot firms were forced to charge the same differential as the odd-lot defendants.

7. The 1938 Committee report, hearings, and the policy generated thereby were never disclosed to the public. Indeed, the Commission, which was not notified by amendment to the Exchange's registration statement or by any

other official means, apparently first became aware of this policy during the course of its Special Study investigations.

8. While there has been no price competition between odd-lot firms since 1938, the firms have competed in terms of services provided for commission houses. The benefits of these services, which include interest free loans and market information, enure to the commission houses rather than to investors. On the other hand, the differentials, which are not paid by commission firms, affect only the investing public.

9. The 1938 Committee policy or "ruling" had a devastating effect upon the smaller odd-lot firms which did not have the resources to compete with the odd-lot defendants in services and thus were dependent upon some sort of price competition in order to attract and maintain business. The Exchange policy, which foreclosed price competition, insured the ultimate demise of the smaller odd-lot firms.

10. In 1941, the odd-lot dealers decided to increase the differential on stock selling below *$1.00*. Upon receipt of notice of this increase from the Exchange, the Commission inquired as to whether public disclosure of the new differential would be announced to the public. In response to this query the Exchange replied as follows:

> "The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100 share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore, it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change."

11. In 1950, the Commission's then Director of the Division of Trading and Exchanges wrote the Exchange: "[W]e feel that the Exchange should consider the advisability of adopting rules, regulations, or interpretations reduced to writing which would govern the existing operational methods" of the odd-lot dealers. The Exchange replied that it was reluctant to do so and the matter was dropped until the Exchange adopted Rule 125 at the Commission's request in 1964.

12. Prior to July, 1951, odd-lot firms charged a differential of ⅛ point on all stock selling for more than $1.00. In 1947, the odd-lot defendants began discussing the feasibility of increasing the differential. By December, 1950, the odd-lot defendants had agreed between themselves to increase the differential to ¼ point on all shares selling for more than $60.00. The proposed $60.00 breakpoint was informally presented by the odd-lot defendants to the Exchange, but was not mentioned to the other firms also engaged in odd-lot transactions over the Exchange. The Exchange disclaimed jurisdiction over the proposed differential increase but informally expressed the opinion that it had no objection to its implementation. Thereupon, the odd-lot defendants decided to seek approval of their proposed increase of differentials from the Commission. Accordingly, they jointly hired counsel who presented their case to the Commission. While doubting that it had jurisdiction, the Commission stated that it had no objection to implementation of the new differentials.

13. The odd-lot defendants, realizing that they would lose business if odd-lot firms on other exchanges continued to charge a lower differential, sought to have the other exchanges raise their differentials to accord with their own. The odd-lot defendants turned first to the Midwest Ex-

change ("Midwest"), which had been considering conversion to a decimal differential system which, in some cases, would have offered cheaper rates to investors. Midwest, which had its own reasons for wanting a decimal system, at first refused to accept the differentials proposed by the odd-lot defendants. After protracted and fruitless negotiations, the odd-lot defendants told Midwest that they would be willing to drop the breakpoint below $60.00 but, if Midwest did not come to terms, they would increase their differential only on stock not traded over regional exchanges—thereby increasing their profits without conferring benefit upon members of Midwest and other regional exchanges. Midwest capitulated and agreed with the odd-lot defendants to accept a breakpoint of $40.00.

14. As a part of their agreement, Midwest undertook to insure that all of the western exchanges would agree to charge the new differential with the $40.00 breakpoint. The odd-lot defendants agreed to see to it that the eastern exchanges did likewise. The president of Midwest also sought Commission approval for the new rates to be charged on all exchanges. On July 16, 1951, the Commission advised that it would not object to a $40.00 breakpoint.

15. Of all the regional exchanges approached by Midwest and the odd-lot defendants, only the Boston Exchange ("Boston") refused to raise its differentials. Boston's members reasoned that if their odd-lot differentials were lower, they might expect additional odd-lot business to come their way. Accordingly, on July 9, 1951, the Boston odd-lot traders unanimously resolved that they would not increase their differentials

16. The present of the Boston Exchange informed the Exchange that Boston would not advertise its lower differential in order to increase its odd-lot business. Boston's

president has testified on another occasion that he made this promise in fear of retaliation from the Exchange. This concern stemmed in part from the Exchange's threat in 1940 to restrict the use of its members' funds in odd-lot transactions on other exchanges. Furthermore, many of Boston's members relied upon the Exchange for financing, up to date price quotations and the clearing facilities of various dual memberships.

17. On the regional exchanges, odd-lot transactions are handled by stock specialists instead of specialized odd-lot firms as they are on the Exchange. Odd-lot business is very important to these regional specialists and to the exchanges on which they operate. For example, while odd-lot transactions accounted for about 10% of the Exchange's business, they approximated 48% of Boston's share volume.

18. On July 20, 1951 representatives of the odd-lot defendants and the Exchange met to discuss notice of the increased differentials. At this meeting, the Exchange disassociated itself from the release, but agreed to respond to public inquiry concerning the increase. In order to be able to answer such questions, the Exchange, which theretofore apparently had neither sought nor received any data to support the new differentials, requested that the odd-lot defendants furnish information in support of the increase at that late date.

19. Shortly before the increase was publicly announced, the then existing smaller odd-lot firms trading over the Exchange were informed for the first time of the raised differentials and asked to sign the announcement. One such firm refused to sign, but, fearful that it would be suspended in accordance with the 1938 Committee policy, went along and charged the increased differential.

20. On July 25, 1951, the odd-lot firms issued a release addressed to member firms of the Exchange announcing that they were going to charge new differentials. This release apparently invited no public discussion and none ensued, perhaps because the release was virtually simultaneous with the effective date of the increase.[2]

21. In August, 1951, the Boston Exchange, despite its ban on advertising, began to experience an increase in odd-lot business. This created some dissension in the Boston ranks. Some of the Boston dealers, particularly the smaller ones, began to urge advertisement of the lower differentials in effect on their exchange in order to increase business. The larger Boston brokers, who had dual memberships and were more sensitive to pressure from the Exchange, advocated that Boston's differential be raised to correspond with that charged elsewhere.

22. In October, 1951, the Boston Governing Committee polled its members to see whether Boston should also raise its differentials. The result of the poll was 42 to 41 in favor of retention of the ⅛ point differential. Nevertheless, Boston raised its rates shortly thereafter, claiming that the dealers who had voted for the higher differential, although numerically a minority, actually conducted 75% of the odd-lot business.

23. In 1956, the Exchange engaged Ebasco Services, Inc. to study Exchange methods and make proposals for their modernization. In due course, Ebasco studied odd-lots and made proposals for modernization of odd-lot pro-

2. Nowhere in the evidence before me do I find the full text of the July 25, 1951 release or the effective date of the new differentials. I infer, however, from the *SEC Special Study* and the portion of the release contained therein, that notice of the new differentials and the implementation thereof were nearly, if not actually, simultaneous. SEC, *Report of Special Study of Securities Markets*, H. R. Doc. No. 95, Pt. 2 at 183 (1963).

cedures. The odd-lot defendants, fearing a decrease of the differential among other things, opposed the Ebasco proposals and succeeded in defeating implementation thereof. Although the differentials were reduced in 1966, the Ebasco proposals, which would have substantially cut the costs of odd-lot transactions, remain unconsidered and unimplemented.

CONCLUSIONS OF ULTIMATE FACT AND LAW

1. The odd-lot defendants fixed the differentials or prices, to be charged in odd-lot transactions over the Exchange. These rates which were fixed in 1951 were in effect until 1966.

2. The odd-lot defendants fixed the differentials to be charged on other exchanges in 1951. These differentials were also in effect in the early 1960's.

3. The Exchange was an active participant in these price fixing arrangements. This participation took the form of failure to regulate, acquiescence in the increase, and maintenance of its 1938 policy of enforcing the odd-lot defendants' rates upon others.

4. Plaintiff and the class have established that they may likely carry their burden of producing evidence that the defendants fixed prices. Under the *per se* rule, once this showing has been made, judgment must follow and the court need not consider any defenses such as the reasonableness of the price formula or the fact that the public has not been harmed. *United States v. National Association of Real Estate Boards,* 339 U. S. 485 (1950); *U. S. v. Trenton Potteries,* 273 U. S. 392 (1927).

5. Defendants urge this court to apply the rule of reason, which "* * * permits the courts to decide whether conduct is significantly and unreasonably anti-competitive

in character and effect." *Report of The Attorney General's National Committee To Study the Antitrust Laws,* 11 (1955). The rule is not, however, unlimited in scope and will operate to excuse only conduct that can be shown to be incidental or ancillary to competition. See, e.g. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344 (1933). The rule of reason almost certainly is inapplicable to this case, however, since price fixing agreements are conclusively presumed anti-competitive in both purpose and effect. See *United States v. Trenton Potteries, Co., supra* at 396-398. "In such cases, inquiry under the Rule of Reason is over once it has been decided that the conspiracy or agreement under review in fact constitutes price rigging * * *" *Report of the Attorney General, supra* at 11.

Defendants also argue that application of the rule of reason to an allegedly analogous situation in *United States v. Morgan,* 118 F. Supp. 621, 688-691 (S. D. N. Y. 1953) indicates that it should pertain here. In *Morgan,* however, Judge Medina found that the restraints there at issue affected neither competitors nor market prices. *Ibid.,* 118 F. Supp. at 689. Because the facts here tend to show that competitors and market prices were directly affected, *Morgan* may be said to stand for the proposition that the rule of reason should be applied to this case.

6. The defendants also claim that they are immune from anti-trust liability as theirs is a regulated industry. Specifically, defendants argue that insofar as the Exchange is vested with self-regulatory powers, its approval of the differentials protects both it and the odd-lot defendants from anti-trust scrutiny. While *Silver v. New York Stock Exchange,* 373 U. S. 341 (1963), which held that self-regulatory acts by the Exchange are exempt from antitrust laws only to the extent necessary to effectuate the purposes of the Exchange Act, might be read to refute this

claim without more, defendants strike two separately stated arguments off the *Silver* analysis. First, they urge that because the effect of self-regulatory acts must be investigated to ascertain whether they are necessary to fulfill the commands of the Act, it follows that the *per se* rule cannot be applied at all. This view, as defendants see it, is supported by *Kaplan v. Lehman Bros.*, 250 F. Supp. 562 (N. D. Ill., 1966), aff'd. 371 F. 2d 409 (7th Cir.), cert. den. 389 U. S. 954 (1967). Second, it is urged that the violation here complained of, the fixing of odd-lot differentials, is mandated by and necessary to implement the Act.

In my view, these two arguments are logically one—and the latter statement of that one argument is the better articulation. In other words, the question of whether or not the *per se* rule is applicable, see discussion *supra,* is a separate question from that of whether or not the Exchange's regulatory approval of fixed differentials was within the purview of the Act and necessary to its implementation. On the other hand, if defendants are correct that fixing of the differentials with Exchange approval was proper and necessary to implement the Act, they presumably would have a complete defense to this action. For reasons to be hereinafter summarized, it is doubtful that such a defense can be sustained. Certainly, regulation of odd-lot differentials is within the scope of, mandated by and necessary to the implementation of the purposes and intent of the Act. See 15 U. S. C. §§ 78 and 78s. Further, if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or "benign acquiescence"

can be considered to constitute regulation mandated by the Act. Even if it could be so considered, such "regulation" scarcely would be immunized from judicial review. To illustrate, defendants may have failed to consider that when the Exchange exercises its self-regulatory powers, it owes at least its members, if not others, certain procedural safeguards such as notice and the opportunity to be heard. In its "regulation" of odd-lot differentials, the Exchange provided notice to no one and afforded only the odd-lot defendants an opportunity to be heard. Therefore, plaintiff and the class have a powerful claim that "* * * the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation." *Silver, supra,* 373 U. S. at 365.

7. Defendants next argue that the Commission's approval rendered the differentials the "legal" rate and that thus they cannot be held liable, even though that rate was initially fixed in violation of the antitrust laws. *Keogh v. Chicago & Northwestern Railroad Co.,* 260 U. S. 156 (1922). It is at least questionable whether the Commission, while doubting its jurisdiction to do so, could grant administrative approval in the sense to which *Keogh* refers. This argument need not be reached, however, since *Keogh* and its progeny are to be applied only "* * * in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat. Bank,* 374 U. S. 321, 351 (1963). Insofar as *Silver, supra,* has made it clear that a "plain repugnancy" does not exist between the Act and the antitrust laws, the *Keogh* doctrine is of no applicability here.

8. Finally, defendants claim that plaintiff and the class are barred from seeking damages since they failed to com-

plain of the differentials to the Commission under the provisions of the Administrative Procedure Act, 5 U. S. C. § 8551 *et seq.* While this argument might have some force if that agency could provide the relief here sought, the Commission is clearly powerless to do so. Although the Commission can consider antitrust matters, as can any other regulatory agency, see *The Rules of the New York Stock Exchange,* 10 S. E. C. 270 (1941), it does not have primary jurisdiction thereof. *Thill Securities Corp. v. New York Stock Exchange,* 433 F. 2d 264, 272 (7th Cir., 1970). Furthermore, the Exchange, which could not be an "aggrieved person", has no standing to commence antitrust suits, see *Hawaii v. Standard Oil of California,* No. 70-49 (U. S. Supreme Court, March 1, 1972), and, of course, could not entertain a class suit or award damages. Indeed, the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966. To now bar plaintiff from seeking recovery of damages incurred prior to 1966 would be unjust and would needlessly sacrifice "* * * the benefits of competition acknowledged by Congress." *United States v. Third National Bank in Nashville,* 390 U. S. 171, 189 (1968).

9. Concerning plaintiff's claim against the Exchange for failure to regulate, the Exchange may well be liable to plaintiff and the class for a violation of its statutory duty to regulate its members, provided that (1) damage can be shown, *Baird v. Franklin,* 141 F. 2d 238 (2d Cir.) *cert. den.* 323 U. S. 737 (1944), and (2) there is proof that the Exchange either knew or had reason to know that its rules were being violated. *Pettit v. American Stock Exchange,* 217 F. Supp. 21, 29-30 (S. D. N. Y., 1963). It has recently been held that the Exchange may also be civilly liable for a failure to regulate its membership under a third party

beneficiary theory. *Weinberger v. New York Stock Exchange,* 335 F. Supp. 139, 144 (S. D. N. Y., 1971).

Defendant Exchange acknowledges these cases but asserts that they are distinguishable as they all concern the failure of the Exchange to adhere to its own rules and not the failure to create rules. This is likely to be a distinction without a difference. Moreover, the argument ignores the fact that the duty to regulate springs from the Act and not from any rule the Exchange might adopt thereunder. At the very least, the Exchange is under a "* * * twofold duty * * * of enacting certain rules and regulations and of seeing that they are enforced." *Baird v. Franklin, supra,* 141 F. 2d at 244.

Plaintiff has excellent evidence that the Exchange has not satisfied either of these duties. As has been repeatedly stated herein, no rules concerning odd-lot differentials were enacted or approved by the Exchange, notwithstanding the rather plain requirements of Sections 6 and 19 of the Act. 15 U. S. C. § 78f and § 78s. The "practices" which the Exchange claims satisfied its duties with regard to the differentials could be interpreted as no more than complicity in the price fixing schemes of the odd-lot defendants or an example of the Exchange's "* * * inability or unwillingness to curb abuses * * *" *Silver, supra* at 351. In sum, plaintiff and the class have a strong case that the Exchange acquiesced to increased differentials with at least constructive knowledge that resulting increased costs to the investing public would benefit only a select few of its members—i.e. that the Exchange condoned one of the very abuses which the Act was passed to curb.

Allocation of Cost of Notice

On the basis of the foregoing, it appears that plaintiff and the class he represents are more than likely to prevail

at trial or upon a motion for summary judgment. Rule 56, F. R. Civ. P. I conclude, therefore, that defendants should bear 90% of the costs of Rule 23(c)(2), F. R. Civ. P. notice to the class. Of defendants' share, one-half should be borne by the Exchange and one-half by the odd-lot defendants. The remaining 10%, which represents the "hazards of litigation", must be put up by plaintiff.

It is so ordered.

Dated: April 4, 1972

H. R. Tyler, Jr.
U. S. D. J.

NOTICE OF MOTION TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 11, 1972, TO FIX A BRIEFING SCHEDULE AND DATE FOR ORAL ARGUMENT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of William E. Jackson, sworn to April 11, 1972, the decision, opinion and order of this Court dated March 8, 1968, retaining jurisdiction herein, and the decisions, opinions and orders of the District Court herein dated April 7, 1971 and April 4, 1972, and all prior proceedings, the undersigned will move this Court at a time and date to be designated by the panel that will hear the motion, for an order pursuant to this Court's aforesaid decision fixing a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
April 11, 1972

Yours, etc.,
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AFFIDAVIT OF WILLIAM E. JACKSON IN SUPPORT OF MOTION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for appellee New York Stock Exchange, Inc., and make this affidavit in support of appellees' motion pursuant to this Court's opinion of March 8, 1968, retaining jurisdiction herein, to set a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action.

Prior Proceedings

This action was commenced on May 2, 1966. The complaint alleges that the action is a class action on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange. The action is brought against Carlisle & Jacquelin and DeCoppet & Doremus for allegedly fixing the odd-lot differential in violation of Sections 1 and 2 of the Sherman Act and against the Exchange for allegedly failing adequately to regulate in violation of Section 6 of the Securities Exchange Act of 1934. Upon motion by defendants, the District Court (Tyler, J.) by decision and opinion

dated September 27, 1966, (41 F. R. D. 147) dismissed the action as a class action because (a) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class; (b) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; and (c) questions common to the class did not predominate over questions affecting individual members.

Plaintiff appealed from the District Court's decision and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. This Court (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, J.) by decision and opinion dated December 19, 1966, held that the denial of class action status was appealable as a final order under 28 U. S. C. § 1291 because it constituted the "death knell" of the action. 370 F. 2d 119 (2d Cir. 1966), *cert. denied,* 386 U. S. 1035 (1967). Cf. *Hackett v. General Host Corp.,* CCH Trade Reg. Rep. ¶ 73,800 (3 Cir. 1972).

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, this Court (Medina and Hayes [*sic*], Circuit Judges, per Medina, J.) reversed, articulated a number of principles in regard to facts of this case then in the record, expressly retained jurisdiction and remanded to the District Court for an evidentiary hearing to determine further facts consistent with this Court's opinion. This Court stated:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the question of notice, adequate representation, effective

administration of the action and any other matters which the District Court may consider pertinent and proper." (391 F. 2d at p. 570)

Chief Judge Lumbard filed a dissenting opinion in which he stated, among other things:

> "The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." (391 F. 2d at p. 572).

Thereafter, the parties sought to determine the facts called for by this Court's opinion. Many of the facts were stipulated and an evidentiary hearing was held on April 30, 1970. By opinion and order dated October 8, 1970, the District Court (Tyler, J.), called for further information consistent with this Court's opinion. That information was supplied.

By opinion and order dated April 7, 1971, (52 F. R. D. 253), the District Court (Tyler, J.) made certain findings of fact (pp. 256-260) in response to the remand of this Court. In addition, we submit, as hereinafter set forth, the District Court went beyond the mandate of this Court to find facts (391 F. 2d at p. 570) by writing a new opinion directly contrary to its initial decision, holding that the action could be maintained as a class action, and expounding extraordinary notice and damage theories (pp. 260-272). This opinion of the District Court exercises the decision-making function that this Court reserved to itself when it retained jurisdiction, and is squarely at odds with many of the principles articulated by this Court in its opinion remanding the case.

One such principle contravened by the District Court is that the cost of supplying the notice required by Rule 23

(c)(2) and the Due Process Clause must rest upon the representative party when he is the plaintiff (391 F. 2d at 568). The District Court held that the question of who pays for the notice was an open one to be determined only after a preliminary hearing on the merits and intimated that the cost of notice could be allocated between plaintiff and defendants on the basis of which side makes the stronger showing in the preliminary hearing on the merits (pp. 270-272).

Upon being informed of defendants' intention to seek immediate review because of their belief that such a preliminary hearing would be based on principles contrary to those contained in the opinion of this Court, as well as highly prejudicial, burdensome and unnecessary, Judge Tyler agreed to stay the preliminary hearing pending application to this Court, on the condition that defendants make clear to this Court that he thought such a preliminary hearing should precede review. (Tr. of conference with Court, May 17, 1971, pp. 11-12)

By notice of motion dated May 21, 1971, defendants moved this Court for an order fixing a briefing schedule and date for oral argument of the issues raised by this Court's decision of March 8, 1968 in the light of the facts found by the District Court in its April 7, 1971 decision. Pursuant to Judge Tyler's request, the moving papers informed the Court of his view that review by this Court was then premature, and should not take place until after the District Court's preliminary hearing on the merits. The motion was denied by order of this Court dated June 10, 1971 (Medina, Lumbard and Hays, Circuit Judges).

The preliminary hearing was held before the District Court on February 9, 1972. By opinion and order dated April 4, 1972 (copy attached hereto), the District Court determined that the merits of the case showed that plaintiff was more than likely to prevail at trial or upon a motion for

summary judgment to such an extent that defendants should bear 90% of the costs of the Rule 23(c)(2) notice to the class and that the remaining 10% should be borne by plaintiff as "the hazards of litigation". This cost had been computed to be "approximately $21,720.00" in the Court's opinion of April 7, 1971. (52 F. R. D. at p. 263). Thus, the effect of the District Court's ruling is to force defendants to pay over approximately $19,530 to finance a litigation against themselves, which, in view of plaintiff's oft asserted limited means, will be unrecoverable should defendants prevail upon the merits. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

The District Court's Two Opinions Are Directly Contrary to the Decision of this Court

The instant motion is brought on because in reaching its various conclusions, the District Court not only exceeded this Court's mandate of March 1968, but so far departed from all accepted and usual norms of judicial procedure as to infringe seriously upon the procedural and constitutional rights of defendants and the alleged class members. This is manifested not only in the District Court's about-face ruling that this action may after all be maintained as a class action, but in its unprecedented use of a "fluid class recovery" concept which would result in antitrust damages being awarded to a group that has never claimed to be injured and in fact has not been injured. It is also manifested in the District Court's failure to require individual notice except to a small segment of the 2,250,000 identified class members, and in its decision to prejudge the merits, which has resulted in imposition of 90% of the (irrecoverable) cost of giving notice ($19,530) on defendants.

A. *Limited Scope of the Remand.* This case was the initial class action decision in this Circuit under amended

Rule 23, which became effective on July 1, 1966. Consequently, this Court's opinion on the class action questions constituted the first and leading decision of a Court of Appeals on the principles to be applied to a class action determination. This Court's opinion has been cited in practically every subsequent class action decision. The principles articulated by the Court have played a role in fashioning the decisions of each succeeding court. This Court's opinion makes clear that quite properly it reserved to itself the task of further fashioning this important body of law consistent with the basic principles articulated in its decision after the requested facts were reported by the District Court. In no way did this Court suggest that it relinquished any jurisdiction to the District Court other than to find the requested facts through an evidentiary hearing.

Nevertheless, the District Court's decisions attempt to supersede the decision of this Court and pre-empt the decision-making function which this Court reserved to itself. In so doing, the District Court ignored many of the principles established by this Court and followed subsequently by many other courts, and did so, at one point (52 F. R. D. at p. 269), by citing a subsequent decision of this Court, *Green v. Wolf Corp.*, 406 F. 2d 291, 301, N. 15 (2d Cir. 1968), which, however, in no way changed the unequivocal holding of this Court in this case. For these reasons, prompt review and setting aright the decisions of the District Court are imperative.

B. *The District Court's Notice Program.* In his initial opinion, Judge Tyler correctly held that "both the Rule and concepts of due process require individual notice for the class members who can be identified". 41 F. R. D. 151. Similarly, this Court found that:

> "Notice, as an integral part of due process must be 'reasonably calculated, under all the circum-

stances, to apprise interested parties of the pendency of the action and afford them an opportunity to present other objections'."

* * *

"The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff." (391 F. 2d at p. 568)

* * *

"* * * we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." (391 F. 2d at p. 569).

* * *

"If the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." (391 F. 2d at p. 570)

Yet, despite its finding that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of fact 5, 9, 10; 52 F. R. D. at pp. 257-258), the District Court has outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a ¼ page notice would be published in four newspapers (52 F. R. D. at pp. 267-268). Thus, despite the fact that the names and addresses of 2,250,000 class members can be identified, less than ½ of 1% of those class members will receive the individual notice mandated by Rule 23 and the Due Process Clause. Furthermore, rather than assigning the task of furnishing notice to plaintiff, Judge Tyler has decreed

that this task, in the proportion of 90% and to the extent of $19,530, unrecoverable, rests upon defendants. In a case such as this, which is not a shareholder's derivative suit, forcing defendants to finance a lawsuit against themselves, a lawsuit which can be of no possible benefit to them, is a clear denial of due process. See *Cusick v. N. V. Nederlandsche Combinatie Voor Chemische Industrie,* 317 F. Supp. 1022, 1025 (E. D. Pa. 1970).

C. *The District Court's theory of a recovery for in futuro odd-lot purchasers is contrary to the principles of this Court's opinion, the antitrust laws, and the remedy articulated by this Court for the Exchange Act violation alleged.* The decision of this Court never contemplated any recovery other than that of money damages for members of the class who had allegedly been injured.

> "On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants."
>
> • • •
>
> "Moreover, in the present case there is no public administrative body that could insure repayment, so the responsibility must ultimately rest on the judicial system." (391 F. 2d at 567)

In fact, money damages for those proving injury is the only relief possible under Section 4 of the Clayton Act (15 U. S. C. § 15), which provides that "any person who shall be injured in *his* business or property shall recover three-fold the damages *by him sustained* * * *" (emphasis added). It is also the remedy for violation of Section 6 of the Exchange Act. See *Baird v. Franklin,* 141 F. 2d 238 (2d Cir.), *cert. denied,* 323 U. S. 737 (1944). This action

is brought under both statutory provisions (Complaint ¶¶ 2; 21).

Judge Tyler (52 F. R. D. at pp. 264-265), however, adopts the position advanced in midstream by plaintiff when confronted by the vast manageability problems of this action as a class action: that recovery need not be for the benefit of class members for redress of whose injuries the action was commenced, but could, in order to meet the manageability requirement of Rule 23, consist of a future adjustment of the odd-lot differential to benefit future odd-lot traders and to penalize defendants. Judge Tyler calls this remarkable invention, which constitutes an abandonment by plaintiff of the class claimed to be represented, a "fluid class recovery" (p. 264). There is no support for such a departure from Rule 23, the unmistakably clear language of the Clayton Act, or this Court's interpretation of the Exchange Act. In fact, the Supreme Court has held that Rule 23 does not and cannot alter requirements of substantive law. *Snyder v. Harris,* 394 U. S. 332, 336 (1969). See also Handler, Twenty-Fourth Annual Review, "Fluid Classes and Wealth Distribution" 26 Record of the Association of the Bar of the City of N. Y., 753, 770-775 (December 1971).

There is in the record in this case no showing whatsoever that all or even some odd-lot customers during the years of 1962-1966 will or even may be odd-lot customers after the ultimate decision in this case. (Compare 52 F. R. D. at p. 265). See *City of Philadelphia v. American Oil Company,* 53 F. R. D. 45, 72-73 (D. N. J. 1971) Judge Tyler furthermore glosses over (p. 265) the fact that the rate of commission as to odd-lot trading is within the exclusive jurisdiction of the Securities and Exchange Commission under Sections 19(b)(9) and (11) of the Exchange Act (15 U. S. C. § 78(s)(b)(9, 11), subject only to judicial

review by the appropriate United States Court of Appeals under Section 25(a) of that Act (15 U. S. C. § 78y).

D. ***The preliminary hearing violated the Fifth and Seventh Amendments and has resulted in misapplication of the substantive law.*** As a result of the preliminary hearing, the District Court concluded that the odd-lot defendants had fixed the differential in 1951 and that the Exchange was an active participant through its failure to regulate. Ruling that plaintiff was more than likely to prevail, the District Court then ordered defendants to pay 90% ($19,530) of the notice cost that this Court had ruled plaintiff must pay. Because the reason for the preliminary hearing was that plaintiff had claimed (not established in the record at all) that he could not pay any more than nominal notice costs, it seems plain that should defendants eventually prevail on the merits before a jury, which has been demanded in this action, they will never recover the substantial amount of money they are now ordered to pay. The Court's order thus amounts to a clear violation of defendants' rights to trial by jury under the Seventh Amendment and to due process under the Fifth Amendment.

Furthermore, when Judge Tyler set the ground rules for the preliminary hearing, he indicated that the burden was entirely that of plaintiff and that defendants could sit down and say nothing. The Court said:

> "I thought about that [defendants' concern about having to present a full-blown defense at the preliminary hearing] because I anticipated that you would raise that point and perhaps I didn't make it precise enough in my discussion in that already frighteningly lengthy last opinion of mine. But I will be completely blunt about it. I mean to say

then and I certainly mean to say now that the burden is on the plaintiff, as I see it, in this mini-hearing, if we use that phrase, and that the defendants are in a very good position if they chose to see it this way in not having any burden at all.

"In other words, even if the plaintiff, if you were to accept me at my word and just sit down and say nothing, maybe cross-examine somebody if they are going to produce a witness a little bit, but if you produce no evidence whatsoever, you would be in the very fortunate position of not being out of court even though you produced no evidence whatsoever." (Tr. of conference with Court, May 17, 1971, pp. 6-7)

The Court's award, following this instruction, compounds the violations of defendants' constitutional guarantees.

The District Court based its substantive conclusions (p. 16) on the fact that the Exchange regulated the differential through settled practice rather than formal rule. Defendants contend that in arriving at these conclusions, the District Court flagrantly ignored and misapplied the principles set forth in *Silver v. New York Stock Exchange*, 373 U. S. 41 (1963); *Kaplan v. Lehman Brothers*, 250 F. Supp. 562 (N. D. Ill. 1966), *aff'd*, 371 F. 2d 409 (7th Cir. 1967), *cert. den.* 389 U. S. 954 (1967); *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (1970), *cert. den.* 401 U. S. 994 (1971); *United States v. Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953); and *Baird v. Franklin*, 141 F. 2d 238, 242 (2d Cir.), *cert. den.* 323 U. S. 737 (1944) in respect to the following facts, among others, that were placed in the record by defendants at the preliminary hearing:

(1) Sections 19(b)(9) and (11) of the Exchange Act give the S. E. C. power to order changes in rules

and practices of the Exchange particularly in respect to the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales;

(2) The S. E. C. has concurred that practices are co-equal with rules for purposes of Section 19(b), *In re the Rules of the New York Stock Exchange,* 10 Sec. Dec. & Rep. at 293 (1941);

(3) Historically it had been the practice on the Exchange for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S. E. C., and such practice was left undisturbed by the S. E. C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange,* 10 Sec. Dec. & Rep. 270 (1941);

(4) Between 1950 and 1964 the Exchange had each year advised the S. E. C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange";

(5) The 1951 increase in the differential here alleged to be an antitrust violation was, with the approval of the Exchange, presented to the S. E. C. by the odd-lot defendants and elicited S. E. C. approval, as shown by the following minute of the S. E. C.:

> "After due consideration, the Commission took the position, and so advised Mr. Hanrahan, that * * * the Commission had no objection to the present proposal for an increase in the odd-lot

differential and would take no action, if the firms of Carlisle & Jacquelin and DeCoppet & Doremus should proceed with such increase." (Ex. J at the preliminary hearing)

(6) The question of the 1951 increase in the differential was thereafter presented to the S. E. C. again by the Midwest Stock Exchange and approved after a two-day hearing (Ex. Q, Ex. 1, p. 182; Ex. 7, pp. 41-44 at the preliminary hearing); and

(7) In April, 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time and in 1966 the Exchange amended that rule at the request of the S. E. C. made pursuant to Section 19(b) of the Exchange Act.

In short, the District Court, despite its disclaimer, has prejudiced all further proceedings in this case by insisting on a "preliminary", i.e., cursory, determination of the merits for the purpose of allowing an assertedly impecunious plaintiff to avoid payment of the cost of notice to the class of which he is the self-proclaimed champion. In doing so, the Court completely ignored the obvious import of one of the crucial facts which it found—that the odd-lot differential was within the S. E. C.'s supervisory powers under Section 19(b) of the Exchange Act. Thus, defendants are penalized for doing what they openly and consistently told the S. E. C. they were doing for a period of over 20 years, and which the S. E. C. permitted them to continue to do although it had the power to stop it.

E. *By its avoidance of procedural requirements, the District Court's opinion works substantive injustice upon defendants and a great burden upon the judicial system.* The thrust of the District Court's opinions is that a serious wrong has been alleged and it is the duty of the District

Court to do whatever is required, despite commonly accepted rules of procedure, to permit this claim to be prosecuted as a class action. Counsel for appellees believe that such was not the intent of this Court's decision and should not be the law. See generally American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (March 15, 1972). The District Court's preliminary consideration of the merits alone has been ruled by one Court of Appeals to be sufficient for reversal. *Miller v. Mackey International, Inc.*, CCH Fed. Sec. L. Rptr. ¶ 93,282 (5 Cir. 1971). If the District Court's approach is permitted to stand, defendants in cases such as these for all practical purposes will be deprived of their right to a trial on the merits, and the federal courts will become in great part administrative agencies to preside over class action settlements. See *e.g.*, *West Virginia v. Chas. Pfizer*, 68 Civ. 240 (S. D. N. Y. 1969).

This affidavit sketches only the major areas in which the philosophy of a "class action at any cost" permeates the District Court's decision. There are many other such areas that will be treated in detail should the Court grant this motion establishing a briefing schedule and a date for oral argument. But these major areas are sufficient to show that the District Court's opinions are seriously at odds with the requirements of Rule 23, the Constitution, the Clayton Act, the Exchange Act, and applicable antitrust decisions in respect to regulation by a national securities exchange, and have invaded the exclusive domain of the Securities and Exchange Commission.

If the District Court's opinions remain law, defendants in large purported class actions such as this will be presented with the choice of continuing to litigate on the merits with the risk of financial ruin should they fail or

settling as "an insurance policy" against ruination. See Handler, "Some Shifts from Substantive to Procedural Innovations in Antitrust Suits", 26 Record of the Association of the Bar of the City of N. Y., 124-134 (February, 1971).

Failure to adhere to accepted procedural requirements in class action determinations *ipso facto* deprives defendants who maintain their innocence of a right to a trial on the merits. See *Schaffner v. Chemical Bank,* CCH Fed. Sec. L. Rptr. ¶ 93,403 at p. 93,020 (S. D. N. Y. March 10, 1972). Counsel for defendants know of no large class action which has gone to trial, though settlements, judicially and economically forced, are legion. The result of the District Court's decisions will be to permit any lawyer who can draft a complaint to obtain a favorable class action decision and then an unwarranted settlement. There will, in short, be the danger that this Court warned against (391 F. 2d at 567)—suits brought only for the benefit of lawyers. See American College of Trial Lawyers Report, *supra,* at pp. 20-21. This very real problem cannot be glossed over by saying that no cost is too great if the alternative is the possible risk that wrongdoers will escape unscathed. Compare *Hackett v. General Host Corp., supra,* at p. 91, 391. When the cost becomes deprivation of Fifth and Seventh Amendment rights, a halt must be called. The cost of the District Court's decisions to the federal judicial system will be equally great. The district courts will in great part become administrative agencies for class action settlements. While it is true that the district courts have proved vigorous and resourceful in making such settlements administratively possible, the question is whether such administrative duties should increasingly be permitted to be heaped upon the already overburdened district courts by fostering *in terrorem* settlements of cases that are in fact unmanageable as class actions.

CONCLUSION

The philosophy of the District Court's opinions overlooks the fact that there is injustice on both sides of the coin unless neutral principles are used in determining class action questions. It also overlooks the burden of its consequences on the judicial system. Such neutral principles were set forth in this Court's remand decision. While they have been adopted by the many other courts which have followed this Court's decision, they have been ignored by the District Court to which they were directed. This Court should review now this very important and developing area of the law that is now at a crossroads to restore to life these neutral principles.

William E. Jackson

(Sworn to April 11, 1972.)

(Exhibit omitted.)

NOTICE OF MOTION TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 11, 1972, TO ORDER TRANSMISSION OF THE RECORD.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of William E. Jackson, sworn to April 11, 1972, the decision, opinion and order of this Court dated March 8, 1968, retaining jurisdiction herein, and the decisions, opinions and orders of the District Court herein dated April 7, 1971 and April 4, 1972, and all prior proceedings, the undersigned will move this Court at a time and date to be designated by the panel that will hear the motion, for an order pursuant to this Court's aforesaid decision directing the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record herein to this Court pursuant to this Court's retention of jurisdiction so that this Court may consider the motion of appellees filed simultaneously herewith requesting this Court to fix a briefing schedule and date for oral argument for the purposes of reviewing and correcting, in the light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

April 11, 1972

Yours, etc.,
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Attorneys for appellant

AFFIDAVIT OF WILLIAM E. JACKSON IN SUPPORT OF MOTION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for appellee New York Stock Exchange, Inc., and make this affidavit in support of appellees' motion for an order directing the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record herein to this Court pursuant to this Court's retention of jurisdiction so that this Court may consider appellees' motion filed simultaneously herewith to fix a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's decision of March 8, 1968, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action.

Pursuant to the remand contained in this Court's decision of March 8, 1968, the record in this action was sent back to the District Court. Appellees are filing with this Court a motion to fix a briefing schedule and date for oral argument pursuant to this Court's retention of jurisdiction. Appellees have requested the Clerk of the United States District Court for the Southern District of New York to

certify and transmit the record herein to this Court pursuant to its retention of jurisdiction so that this Court could consider the aforesaid motion. The Clerk has refused to certify or transmit the record because no notice of appeal has been filed.

WHEREFORE, it is respectfully requested that this motion for an order directing the Clerk of the District Court to certify and transmit the record to this Court be granted.

William E. Jackson

(Sworn to April 11, 1972.)

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 1, 1972, DENYING MOTION TO FIX BRIEFING AND DATE FOR ORAL ARGUMENT WITHOUT PREJUDICE TO RENEWAL AFTER DEFENDANTS HAVE FILED THEIR BRIEF AND APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to set a briefing schedule and date for oral argument of the appeal be and it hereby is denied without prejudice to the renewal of this motion after defendants have filed their Appendix and Brief.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays

Circuit Judges

May 1st, 1972

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 1, 1972, GRANTING MOTION TO ORDER TRANSMISSION OF THE RECORD.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to direct the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the Clerk of the United States Court of Appeals for the Second Circuit be and it hereby is granted.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays

Circuit Judges

May 1st, 1972

DEFENDANTS' NOTICE OF APPEAL FROM ORDERS ENTERED ON APRIL 7, 1971 AND APRIL 4, 1972.

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK

Notice is hereby given that defendants Carlisle & Jacquelin, DeCoppet & Doremus, and New York Stock Exchange, Inc. hereby appeal to the United States Court of Appeals for the Second Circuit from the decisions, opinions and orders entered in this case on April 7, 1971 and April 4, 1972 by Hon. Harold R. Tyler, U. S. D. J., on remand.

Dated: New York, N. Y.
May 2, 1972

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Attorneys for plaintiff

MOTION OF PLAINTIFF IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FOR ORDER DISMISSING APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Mordecai Rosenfeld, sworn to May 16, 1972, and upon all prior proceedings, the undersigned will move this Court on June 13, 1972 at 10:30 A. M. or as soon thereafter as counsel can be heard for an Order dismissing the appeal herein on the ground that the Orders appealed from are not final orders pursuant to 28 U. S. C. § 1291; and for such other and further relief as may be necessary and proper.

Yours, etc.
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New York, N. Y. 10005
Attorneys for defendant Carlisle & Jacquelin

AFFIDAVIT OF MORDECAI ROSENFELD, DATED MAY 16, 1972 IN SUPPORT OF MOTION FOR ORDER DISMISSING APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in the above action. I submit this affidavit in support of plaintiff's motion for an order dismissing defendants' appeal on the ground that the Orders sought to be appealed from (the Orders entered by the District Court on April 7, 1971 and April 4, 1972) are not final orders pursuant to 28 U. S. C. § 1291. A copy of defendants' notice of appeal is annexed hereto as Exhibit A.

1. The action has been brought as a class action (a) against two members of the New York Stock Exchange (Carlisle & Jacquelin and DeCoppet & Doremus) charging them with fixing the odd-lot differential in violation of the federal anti-trust laws and (b) against the Exchange itself for failure to perform its statutory duties with respect thereto in violation of the Securities Exchange Act of 1934. By its Order entered April 7, 1971 the District Court held that the action was maintainable as a class action (52 FRD 253), although the Court specifically left open the question as to which side should bear the cost of notice (approximated as $21,270). To determine that

question, the Court held a separate evidentiary hearing to evaluate the prospect of prevailing that each side had on the merits. As a result of that hearing, the Court, by its Order entered April 4, 1972, allocated the cost of the notice as follows: 90% to be paid by defendants and 10% to be paid by plaintiff. In making that decision, the Court held "that plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment"; the Court also found that "[p]laintiff has excellent evidence" that the Exchange violated its statutory duty to the public".* That is, the Court held that plaintiff was likely to succeed at a *future* trial or on a *future* motion for summary judgment.

In short, the case has not been "finally" decided by the District Court. Indeed, Rule 23(c)(1) specifically provides that the District Court may alter or amend its class action determination at any time before a final order is entered; and, most assuredly, no final order has been entered.

2. After entry of the District Court's 1971 Order, the defendants moved in this Court for the entry of an order directing the Clerk of the District Court to certify and transmit the record to this Court and establishing a briefing schedule and date for oral argument in this Court on the theory that this Court still had jurisdiction of the appeal decided in 1968 (see 391 F. 2d 555); defendants' motions were denied. After the District Court's April 4, 1972 Opinion and Order the defendants again moved this Court for the entry of orders directing the clerk of the district court to enter an order directing the clerk of the District Court to certify and transmit the record to this Court, and establishing a briefing schedule and date for

* A copy of the 1972 opinion is annexed hereto as Exhibit B.

oral argument, repeating their submission that this Court still retained jurisdiction of the appeal decided in 1968. On May 1, 1972 this Court entered orders granting the motion for certification and transmission of the record, but denying the motion to set a briefing schedule and date for oral argument of the appeal, without prejudice to its renewal after defendants had filed their appendix and brief. A copy of the two May 1, 1972 Orders of this Court are annexed hereto as Exhibits C and D.

Plaintiff opposed defendants' aforesaid motions in this Court in both 1971 and 1972 on the grounds that (a) this Court had no jurisdiction to entertain the appeals and (b) the appeals should not be heard as a matter of discretion. It is not clear from this Court's Orders of May 1, 1972 whether or not the jurisdictional question has been ruled upon, since one of the defendants' motions was denied. Plaintiff intends to press that jurisdictional argument in subsequent proceedings in this Court arising out of the May 1, 1972 orders.

The present motion to dismiss is limited to the appeal raised by defendants' notice of appeal (Exh. A). That notice was not filed until after this Court had acted on the motions previously made (Exhs. C and D). Plaintiff submits that since the Orders sought to be appealed from are not final, the appeals should be dismissed.

MORDECAI ROSENFELD
Mordecai Rosenfeld

[Jurat omitted]

ORDER OF UNITED COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 29, 1972, DENYING MOTION TO DISMISS THE APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1972, to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is denied.

HAROLD R. MEDINA,
J. EDWARD LUMBARD,
PAUL R. HAYS,
Circuit Judges.

MOTION OF DEFENDANTS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 26, 1972, TO SET A BRIEFING SCHEDULE AND DATE FOR ORAL ARGUMENT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the order of this Court dated May 1, 1972 denying appellees' motion dated April 11, 1972 to set a briefing schedule and date for oral argument without prejudice to renewal after defendants have filed their appendix and brief, all papers submitted in connection with the aforesaid motion, the appendix and brief of defendants filed simultaneously herewith, the stipulation of all parties so ordered by the Court on July 3, 1972, the affidavit of William E. Jackson, sworn to July 25, 1972, and all prior proceedings, the undersigned will move to renew their aforesaid motion of April 11, 1972 at a time and date to be designated by the panel that will hear the motion and, for the purpose of reviewing and correcting the District Court's decisions of April 7, 1971 and April 4, 1972, for an order fixing September 29, 1972 as the date for plaintiff's brief to be served and filed, fixing the date of October 13, 1972 as the date for defendants' reply brief to be served and filed, and establishing a date thereafter for oral argument which is convenient to the panel that will hear the argument; for an order pursuant to Rule 28(g), Federal Rule of Appellate Procedure, granting defendants permission to file one joint brief of approximately 57 pages in

length; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
July 26, 1972

Yours, etc.,
CARTER, LEDYARD & MILBURN, ESQS.
2 Wall Street
New York, N. Y. 10005
Attorneys for appellee
Carlisle & Jacquelin

KELLEY DRYE WARREN CLARK CARR & ELLIS, ESQS.
350 Park Avenue
New York, N. Y. 10022
Attorneys for appellee
DeCoppet & Doremus

MILBANK, TWEED, HADLEY & MCCLOY ESQS.
By WILLIAM E. JACKSON
(A member of the firm)
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for appellee
New York Stock Exchange, Inc.

To:

MORDECAI ROSENFELD, ESQ.
233 Broadway
New York, N. Y. 10007
HAROLD E. KOHN, P. A.
1214 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
Attorneys for appellant

AFFIDAVIT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange, Inc., and make this affidavit in support of defendants' motion pursuant to this Court's order of May 1, 1972 denying defendants' motion dated April 11, 1972 to set a briefing schedule and date for oral argument without prejudice to renewal after defendants have filed their appendix and brief.

2. The motion of defendants dated April 11, 1972 sought an order fixing a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's decision of March 8, 1968 retaining jurisdiction herein, the District Court's opinions and orders dated April 7, 1971 and April 4, 1972. A motion was also filed for an order directing the Clerk of the District Court to certify and transmit the record to this Court.

3. This Court granted the motion to transmit and certify the record and denied the motion to set a briefing schedule and date for oral argument without prejudice to renewal of that motion after defendants have filed their appendix and brief.

4. Simultaneously with the filing of the instant motion, defendants are filing their appendix and brief. All parties hereto have stipulated that the answering brief of plaintiff shall be served and filed on September 29, 1972, and that stipulation was so ordered by this Court on July 3, 1972.

5. Defendants are filing one joint brief of approximately 57 pages in length. The instant motion therefore also seeks the Court's permission to exceed the 50 page limit set by Rule 28(g), Federal Rules of Appellate Procedure.

WHEREFORE, defendants pray for an order granting renewal of their motion of April 11, 1972 to fix a briefing schedule and date for oral argument for the purpose of reviewing and correcting the District Court's decisions of April 7, 1971 and April 4, 1972, fixing September 29, 1972 as the date for plaintiff's brief to be served and filed, fixing the date of October 13, 1972 as the date for defendants' reply brief to be served and filed, establishing a date thereafter for oral argument, granting defendants permission to file one joint brief of approximately 57 pages in length, and for such other and further relief as to the Court may seem just and proper.

WILLIAM E. JACKSON
William E. Jackson

(Jurat omitted)

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 24, 1972, SETTING A BRIEFING SCHEDULE.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated July 26, 1972, to set the following schedule: appellee shall serve and file his brief by September 29, 1972; appellants shall serve and file their reply brief by October 13, 1972; and to fix the date of oral argument; and for leave to file appellants' brief not exceeding fifty-six printed pages be and it hereby is granted except that the date of oral argument will not be fixed until after all the briefs are in.

HAROLD R. MEDINA,
J. EDWARD LUMBARD,
Circuit Judges.

APPENDIX TO SUPPLEMENTAL STATEMENT OF DEFENDANTS-APPELLEES IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 22, 1972.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Date	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
1966					
May 2	Complaint (A 17) filed; summons issued	8			
May 11	Stipulation and order (May 12, 1966) extending time to respond to complaint	1			
June 1	Notice of Deposition of Reginald P. Rose	4			
June 1	Notice of Deposition of Henry I. Cobb, Jr.	2			
June 1	Notice of Deposition of Van R. Halsey	4			

Date 1966	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
June 13	Stipulation and order (June 14, 1966) adjourning depositions	3			
June 16	Defendants' interrogatories to plaintiff	4			
June 24	Answer of defendant New York Stock Exchange (hereinafter "the Exchange") (A 30)	4			
June 24	Answer of defendant Carlisle & Jacqulin (A 24)	3			
June 24	Answer of defendant DeCoppet & Doremus (A 27)	3			
June 30	Plaintiff's answers to defendants' interrogatories	11			
July 1	Notice of Motion, affidavits and memorandum in support of motion by defendant for a determination that action is not maintainable as a class action (A 247-272)	72			
July 8	Plaintiff's affidavits and memorandum in opposition to motion	45			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1966					
July 12	Defendants' reply memorandum in support of motion	10			
July 12	Hearing of motion		X		
Aug. 18	Stipulation and order (Aug. 19, 1966) adjourning depositions	2			
Sept. 23	Stipulation and order (Sept. 26, 1966) adjourning depositions	2			
Sept. 27	Opinion of District Court dismissing the action as a class action (A 43)				23
Oct. 10	Notice of Motion and Memorandum in support of motion by plaintiff for an order resettling and amending opinion and order	10			
Oct. 20	Defendants' memorandum in opposition to motion	19			
Oct. 21	Stipulation and order (Oct. 24, 1966) adjourning depositions	2			
Oct. 24	Plaintiff's reply memorandum in support of motion	5			

Date 1966	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
Oct. 25	Memorandum of District Court denying motion				1
Oct. 28	Plaintiff's Notice of Appeal	1			
Nov. 14	Notice of Motion in Court of Appeals and memorandum in support of motion by defendants to dismiss appeal	11			
Nov. 16	Stipulation and order (Nov. 18, 1966) adjourning motion	2			
Nov. 30	Affidavit and memorandum of plaintiff in opposition to motion to dismiss	17			
Dec. 1	Stipulation and order adjourning hearing of motion	2			
Dec. 5	Stipulation and order (Dec. 6, 1966) extending time to file record on appeal	2			
Dec. 9	Reply memorandum of defendants in support of motion	11			
Dec. 12	Hearing of motion by Court of Appeals		X		
Dec. 19	Opinion denying motion (A 43)				4

Date 1967	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Jan. 3	Petitions for rehearing or rehearing in banc	9			
Jan. 5	Stipulation and order (Jan. 6, 1967) extending time to file record	2			
Jan. 5	Stipulation and order (Jan. 9, 1967) adjourning depositions	2			
Jan. 13	Petitions for rehearing or rehearing in banc denied				2
Mar. 2	Stipulation and order (March 3, 1967) extending time for plaintiff to file brief	2			
Mar. 23	Defendants' petition for a writ of certiorari	20			
Apr. 19	Plaintiff's brief in opposition to petition for certiorari	14			
Apr. 21	Stipulation and order extending time for plaintiff to file brief	2			
Apr. 21	Stipulation and order (Apr. 22, 1967) adjourning depositions	2			

Date 1967	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
Apr. 28	Defendants' reply brief in support of petition for certiorari	6			
May 8	Petition for certiorari denied				1
July 14	Application and order granting plaintiff leave to serve a brief not longer than 62 pages	3			
July 14	Plaintiff's brief	62			
July 17	Stipulation and order (July 23, 1967) extending time for defendants to serve answering brief	2			
Sept. 22	Application for adjournment of argument of appeal	2			
Oct. 2	Brief of defendant Carlisle and Jacquelin	26			
Oct. 2	Brief of defendants DeCoppet & Doremus and the Exchange	35			
Oct. 27	Plaintiff's reply brief	18			
Nov. 6	Hearing of appeal		X		
Nov. 8	Stipulation and order (Nov. 9, 1967) adjourning depositions	2			

Date 1968	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Mar. 8	Opinion of Court of Appeals reversing, remanding to the District Court and retaining jurisdiction (A 47)				26
Mar. 8	Dissenting opinion of Chief Judge Lumbard				5
Mar. 11	Call of action for review		X		
Mar. 29	Stipulation and order (April 2, 1968) adjourning depositions	2			
June 7	Hearing before the District Court		X	43	
July 19	Stipulation and order (August 6, 1968) adjourning date for exchange of informal request for admissions	2			
Sept. 6	Notice of Motion, affidavits and memorandum in support of motion to disqualify plaintiff's counsel by defendants	35			
Sept. 23	Plaintiff's affidavits in opposition to motion	9			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1968					
Sept. 23	Stipulation and order (Sept. 24, 1968) adjourning depositions	2			
Sept. 26	Hearing before the District Court on defendant's motion		X	26	
1969					
Feb. 12	Notice of Appearance of Mordecai Rosenfeld, Esq., as counsel for plaintiff and Notice of Appearance with Acknowledgment	3			
Apr. 14	Call of action for review		X		
May 13	Call of action for review		X		
June 25	Call of action for review		X		
Oct. 8	Call of action for review		X		
Oct. 14	Plaintiff's interrogatories of defendants	2			
Oct. 27	Stipulation extending defendants' time to object to interrogatories	2			
Nov. 5	Stipulation extending defendants' time to object to interrogatories	2			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1969					
Nov. 14	Answer of the Exchange to interrogatories	4			
Nov. 17	Stipulation extending defendants' time to object to interrogatories	2			
Dec. 2	Stipulation extending defendants' time to object to interrogatories	1			
1970					
Mar. 3	Stipulation Number 1 (A 115)	11			
Mar. 16	Hearing before the District Court		X	19	
Mar. 25	Notice of Motion and affidavit in support of motion by plaintiff to assign action to Hon. Harold R. Tyler, Jr.	7			
Mar. 26	Affidavit in response to motion	1			
Apr. 17	Motion denied without prejudice to renew				1
Apr. 17	Stipulation Number 2 (A 124)	6			
Apr. 30	Hearing before the District Court (A 74)		X	36	
May 7	Affidavit of plaintiff's counsel outlining qualifications	2			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1970					
June 10	Plaintiff's proposed findings of fact and brief in opposition to defendants' motion to dismiss (A 244)	53			
June 17	Defendants' proposed findings and conclusions	15			
June 19	Hearing before the District Court		X	14	
July 17	Defendants DeCoppet & Doremus and the Exchange's post-hearing brief	34			
July 17	Defendant Carlisle & Jacquelin's post-hearing brief	20			
July 30	Plaintiff's reply memorandum	31			
Oct. 7	Call of action for review		X		
Oct. 8	Opinion of the District Court requesting further information (A 98)				7

Date 1971	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Jan. 5	Call of action for review		X		
Jan. 8	Plaintiff's affidavits in response to opinion	5			
Jan. 11	Defendants' affidavits in response to opinion	8			
Jan. 11	Plaintiff's supplemental memorandum	22			
Jan. 11	Defendants' supplemental memorandum	12			
Jan. 11	Defendants' memorandum responding to questions of opinion of October 8, 1970	8			
Apr. 7	Opinion of District Court that action may be maintained as a class action (A 129)				59
May 5	Call of action for review		X		
May 17	Hearing before the District Court (A 169)		X	28	
May 21	Notice of Motion and affidavit in support of motion by defendants to the Court of Appeals for an order setting a briefing schedule and a date for oral argument	14			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1971					
May 25	Notice of Motion and affidavit in support of motion by defendants to the Court of Appeals for an order certifying and transmitting the record	4			
May 25	Plaintiff's affidavit in opposition	2			
June 10	Denial of defendants' motions by the Court of Appeals				2
June 17	Interrogatories and Notices to Produce by plaintiff to defendants	26			
Sept. 7	Notice of Motion, affidavit and memorandum in support of motion by plaintiff to enforce an alleged oral settlement agreement	24			
Sept. 24	Affidavits and memorandum of defendants in opposition to plaintiff's motion and in support of a cross-motion by defendants for a protective order	23			

Date 1971	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Sept. 30	Plaintiff's reply memorandum and affidavit in support of motion to enforce alleged settlement agreement and memorandum in opposition to defendants' cross-motion for a protective order	2			
Oct. 15	Hearing before the District Court		X	8	
Nov. 5	Hearing before the District Court		X	24	
Nov. 15	Deposition of Herbert E. Milstein			71	
Nov. 16	Call of action for review		X		
Nov. 19	Letter from defendants to the District Court in opposition to the application of the office of Harold E. Kohn, P.A. to participate as co-counsel for plaintiff	8			
Dec. 2	Memorandum of plaintiff in support of the application of the Kohn firm	7			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1971					
Dec. 10	Defendants' reply memorandum in opposition to the application of the Kohn firm	9			
Dec. 13	Hearing before the District Court		X	36	
Dec. 15	Memorandum by the District Court permitting the Kohn firm to participate as co-counsel				3
1972					
Feb. 9	Preliminary hearing before the District Court (A 171)		X	46	
Feb. 18	Plaintiff's post-hearing memorandum	51			
Feb. 18	Defendants' post-hearing memorandum	47			
Apr. 4	Opinion of the District Court on allocation of the cost of notice (A 202)				20

Date	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
1972					
Apr. 11	Notices of Motions and affidavits in support of motions to the Court of Appeals by defendants for orders setting a briefing schedule and a date for oral argument and for certification and transmittal of the record to the Court of Appeals (A 218, *et seq.*)	21			
Apr. 19	Plaintiff's memorandum in opposition to defendants' motions	10			
May 1	Defendants' motion for certification and transmittal of the record granted; defendants' motion for a briefing schedule denied without prejudice to renew after defendants have filed their briefs and appendix (A 240-241)				2
May 2	Defendants' Notice of Appeal (A 242)	2			

Date 1972	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
May 8	Memorandum of the District Court regarding use of documents pertaining to an alleged settlement agreement				2
May 17	Notice of Motion, affidavit and memorandum in support of motion by plaintiff to the Court of Appeals for an order dismissing defendants' appeal	9			
May 23	Notice of Motion and affidavit in support of motion by plaintiff for leave to supplement the record	7			
May 30	Defendants' designation of contents of appendix	3			
May 30	Defendants' statement of issues for review	2			
June 7	Plaintiff's designation of parts of the record to be included in appendix	2			
June 8	Defendants' memoranda opposing motion to supplement record and motion to dismiss appeal	23			

Date 1972	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
June 13	Plaintiff's motions for leave to supplement the record on appeal and to dismiss defendants' appeal referred to the panel which heard the previous appeal		X		2
June 14	Plaintiff's designation of exhibits necessary for determination of appeal	4			
June 16	Defendants' supplemental designation of parts of the record to be included in appendix	2			
June 19	Plaintiff's reply memorandum supporting dismissal of defendant's notice of appeal	3			
June 29	Plaintiff's motions for leave to supplement the record on appeal and to dismiss defendant's appeal denied				2
July 3	Stipulation, affidavit and order extending time by which briefs must be served	4			

Date 1972	*Nature of Proceeding*	*Pages of Briefs, Memoranda, Affidavits and Other Court Documents*	*Court Appearances*	*Pages of Transcript*	*Pages of Opinions, Orders and Judicial Memoranda*
July 26	Notice of Motion and affidavit in support of motion by defendants to renew defendants' motion of April 11, 1972 for a briefing schedule and a date for argument	4			
July 26	Defendants' brief filed	56			
Aug. 24	Defendants' motion for a briefing schedule granted				1
Sept. 29	Plaintiff's brief and application pursuant to Rule 28(g)	54			
Oct. 13	Defendants' reply brief and application pursuant to Rule 28(g)	29			
Dec. 12	Argument of appeal		X	135	

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 1, 1973, REVERSING CLASS ACTION ORDERS OF THE DISTRICT COURT, AND CONCURRING OPINION OF JUDGE HAYS.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 341, 381—September Term, 1972.
(Argued December 12, 1972 Decided May 1, 1973.)
Docket Nos. 72-1521, 30934

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* holding that suit by investor on behalf of

himself and other odd-lot stock investors against major odd-lot dealers on New York Stock Exchange and against New York Stock Exchange, was maintainable as a class action, and, following a preliminary hearing, ordering the defendants to bear 90% of the costs of notice.

The action was originally dismissed as a class action, 41 F. R. D. 147, and this Court reversed and remanded to the District Court for further findings necessary for the class action determination, 391 F. 2d 555. Jurisdiction was retained by this Court.

Reversed.

AARON M. FINE, Philadelphia, Pennsylvania (Harold E. Kohn and Allen D. Black, Philadelphia, Pennsylvania, and Mordecai Rosenfeld, New York, N. Y., on the brief), *for Plaintiff-Appellee.*

DEVEREUX MILBURN, New York, N. Y. (Louis L. Stanton, Jr., James E. Massey, and Carter, Ledyard & Milburn, New York, N. Y., on the brief), *for Defendant-Appellee Carlisle & Jacquelin.*

FRANCIS S. BENSEL, New York, N. Y. (Bud G. Holman and Kelley Drye Warren Clark Carr & Ellis, New York, N. Y., on the brief), *for Defendant-Appellee DeCoppet & Doremus.*

WILLIAM E. JACKSON, New York, N. Y. (Russell E. Brooks and Milbank, Tweed, Hadley & McCloy, New York, N. Y., on the brief), *for Defendant-Appellee New York Stock Exchange, Inc.*

MEDINA, *Circuit Judge:*

Sufficient factual background for an understanding of the rulings we are about to make in this extraordinary "class action" is to be found in our first opinion *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (1968), often referred to as *Eisen II*. On that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction.[1] While enter-

1. We retained jurisdiction because of the doubt engendered by the phraseology of the "death knell" opinion, *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035 (1967) (*Eisen I*). We thought this case might be construed as making appealable an interlocutory order dismissing a case as a class action "because no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen," see *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), cert. denied, 395 U. S. 977 (1969), but perhaps denying appealability to a similar order holding the case to be a proper class action under amended Rule 23. While the "death knell" doctrine has been criticized by the Third Circuit in *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U. S. 925 (1972), we think the consequences of class action rulings are so serious that these interlocutory orders should be made appealable, provided we adopt the view expressed by Chief Judge Friendly in *Korn v. Franchard Corp., supra*, 443 F. 2d at 1307, to the effect that this Court should formulate the rule of appealability in such fashion that it "will afford equality of treatment as between plaintiffs and defendants." The same considerations which led this Circuit to apply the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

The "collateral order" doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause "irreparable harm" to the complaining party. The seeds of *Cohen* were sowed by the Supreme Court as early as *Forgay v. Conrad*, 6 Howard 201, 205 when it was said that appealability should be allowed if the effect of an interlocutory order is such that if the order is immediately carried into execution the defendant "may be ruined before he is permitted to avail himself of the right" to appeal. An order sustaining a class action allegation clearly involves issues "fundamental

taining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23.

After almost five years the case is before us again. While much of the delay is not attributable to further proceedings bearing on issues arising under amended Rule 23, a very considerable amount of the time of Judge Tyler and of the lawyers for the respective parties has, in this interval of five years, been devoted to hearings, the taking of depositions, and the preparation and filing of various District Court opinions, preceded by briefs and extensive oral arguments. Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. In the end Judge Tyler was persuaded that the innovations described by Judge Weinstein in his speeches[2] and in his series of opin-

1. (Cont'd.)

to the further conduct of the case;" (see *Gillespie v. United States Steel Corp.*, 379 U. S. 148 (1964); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949); *United States v. General Motors Corp.*, 323 U. S. 373 (1945)); the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident. By this extension or interpretation of *Eisen I* the rule of finality would be given a "practical rather than a technical construction," see *Cohen, supra*, 337 U. S. at 546; *Gillespie v. United States Steel Corp., supra*, 379 U. S. at 152, and we would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations. See *Swift & Company v. Compania Colombiana*, 339 U. S. 684 (1950); *Dickinson v. Petroleum Corp.*, 338 U. S. 507 (1950)).

2. Judge Weinstein's speech on this subject was reported in Weinstein, "The Class Action Is Not Abusive," New York Law Journal, May 1, 1972, p. 1, and May 2, 1972, p. 1.

ions in *Dolgow v. Anderson*, 43 F. R. D. 21 (1967); 43 F. R. D. 472 (1968); 45 F. R. D. 470 (1968); 53 F. R. D. 661 (1971); 53 F. R. D. 664 (1971), were authorized by amended Rule 23. These innovations were the preliminary mini-hearing on the merits and the "fluid recovery," both of which will be fully described in due course. It is clear to us that, with or without these innovations, the notice provided by amended Rule 23 to be given "to all members (of the class) who can be identified through reasonable effort" cannot be given, as Eisen refuses to pay or put up any bond to cover this expense, and, if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose. We are also of the opinion that, on the basis of the new evidence now before us, the lawsuit is unmanageable as a class action, and that no preliminary mini-hearing on the merits and no "fluid recovery" procedures are authorized by the text or by any reasonable interpretation of amended Rule 23. Accordingly, we reverse and dismiss the case as a class action. We also vacate the findings of fact and conclusions of law that were made after the preliminary mini-hearing on the merits.

I

The Decision Below—52 F. R. D. 253 (1971)

In 1968, when the case was previously before us, it was estimated by someone that there were 3,750,000 members of the class, consisting of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. It was then doubtful whether any of the members of the class could be "identified through reasonable effort." Eisen's position then was and now is that, except possibly in the eventuality of the ultimate adoption of Judge Tyler's suggested plan

which envisages payment by defendants of 90% of the cost of giving notice, he will not defray any of the expense of giving notice to any of the members of the class, nor will he post any bond to reimburse defendants for any of their disbursements, pursuant to any order of the District Court, made for the purpose of giving any notice.

It now appears that there are 6,000,000 members of the class and of these 2,250,000 can be easily identified.[3] Members of the class reside in every state of the United States and most foreign countries. They speak and understand a great variety of modern languages. The damages sought to be recovered were estimated at the time we last considered the case at something between a maximum of $60,000,000 and a minimum of $22,000,000.[4] Now the estimate has been raised by Eisen's counsel to 120 millions of dollars.

In our prior opinion we stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that "in this type of case" plaintiff must pay the expense of giving notice to these members of the class.[5] We further stated that if this

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3. According to the opinion below, the names and addresses of approximately 2,000,000 class members can be identified. In addition, another 100,000 or more had odd-lot transactions in stocks listed on the Exchange through what is called the "Monthly Investment Plan." These individuals can be identified through computer tapes in a manner similar to that used for locating the 2,000.000. Furthermore, another 150,000 or so public individuals had odd-lot transactions in stocks listed on the Exchange through "payroll deduction plans" operated by Merrill Lynch, Pierce, Fenner & Smith, Inc. Their names and addresses can be identified through the records of Merrill Lynch.

4. 52 F. R. D. 253, 265 (S. D. N. Y. 1971).

5. We did not in our opinion in *Eisen II* intend our statement that "in such a case as this" plaintiff should defray the cost of notice to be dictum, as has been suggested, see *Berland v. Mack*, 48 F. R. D. 121, 131 (S. D. N. Y. 1969). This statement was part of our interpretation of amended Rule 23 as applied in this case, especially with

could not be done there might be no other alternative than the dismissal of the case as a class action. For some reason not clear to us Judge Tyler disregarded these holdings and concluded that he had discretion, even with reference to those members of the class who could be easily identified, to provide for such notice as he thought to be reasonable in the light of the facts of this particular case.

Thus he directed actual notice only to "the approximately 2000 or more class members who had ten or more transactions during the relevant period" and to "5000 other class members selected at random" from the 2,500,000 class members who could easily be identified.[6] With respect to

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5. (Cont'd.)
respect to the actual individual notice required by subdivision 23(c)(2) to be given to those members of the class who could be identified. This was part of our instructions to conduct a hearing on the remand and decide whether the requirements of amended Rule 23 had been or could be met.

Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F. R. D. 69, 107.

6. Judge Tyler in discussing the notice problems observed that the plaintiff had also offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. This together with the individual notice to the 2000 class members with ten or more transactions and the 5000

the rest of the 6,000,000 members of the class, Judge Tyler ordered what, without reciting all the details concerning the schedule of proposed publications, we consider to be a totally inadequate compliance with the notice requirements of amended Rule 23. One of the reasons for this was perhaps because Judge Tyler thought of these first notices, by mail and by publication, as merely the first of a series of notices. Judge Tyler then deferred the question of who should pay for this first round of notices until after a "brief" preliminary hearing on the merits. This is what is called the "mini-hearing." We shall have more to say later about this preliminary mini-hearing on the merits of Eisen's triple damage antitrust claim. Accordingly, the hearing was held "on the issue of the allocation of the costs of notice" and Judge Tyler concluded that the defendants must bear 90% of these expenses.

To describe Judge Tyler's general scheme as it slowly developed in the series of his many opinions[7] following the remand would be too tedious. The sum and substance of it was that he at last realized that it was highly improbable that any great number of claims would, for a variety of reasons, ultimately be filed by the 6,000,000 members of the class. No claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim. The average odd-lot differential on each transaction had been $5.18. The average individual class member engaging in five transactions would have paid a total odd-lot differential of $25.90. Assuming a 5% illegal overcharge the recovery is approximately $1.30, and when

6. (Cont'd.)
selected at random, and the notice by publication, would in Judge Tyler's view "increase the likelihood of reaching a significant portion of the class," and would be in conformity with the requirements of due process.

7. Judge Tyler's opinions following the remand are reported at 50 F. R. D. 471, 52 F. R. D. 253, and 54 F. R. D. 565.

trebled the average class member would be entitled to damages of $3.90. As the costs of administration might run into the millions of dollars, it was not likely that a rush of claimants would eventuate no matter how extensive the publication. As he had surmised in the beginning, and as Chief Judge Lumbard stated in his dissent (*Eisen II*, p. 571), the class action was hopelessly unmanageable. So Judge Tyler tried to pull the case out of this morass by resorting to the "fluid recovery," which had been used as a vehicle for carrying out a voluntary settlement in the *Drug Cases, State of West Virginia v. Chas. Pfizer & Co., Inc., et al.*, 314 F. Supp. 710 (S. D. N. Y. 1970).[8]

The concept of this "fluid recovery" is very simple. Having decided that there is no conceivable way in which any substantial number of individual claimants can ever be paid, "the class as a whole" is substituted for the 6,000,000 claimants. Thus the first round of notices becomes relatively unimportant. The scheme adopted envisages the first round of notices as sufficient to get the ball rolling. Little is said about Step Two. This involves a trial of the case to a judge and jury on the merits—not a preliminary mini-trial this time, but a real full scale trial of the private triple damage antitrust case. In some way the damages to "the class as a whole" will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the "gross damages" to "the class as a whole." With the money in hand, the case begins to resemble the *Transitron* and *Drug Cases* and from then on we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration. As "the class as a whole" will include all those

8. Judge Wyatt's approval of the settlement was affirmed by this Court at 440 F. 2d 1079 (1971).

who had purchased or sold in the period from mid-1962 to mid-1966 and all those who, at the time of assessing the full damages, were presently purchasing or selling, and those who might in the future purchase and sell, securities in lots of less than 100 shares, it is quite apparent that some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and many other new traders, who had no transactions in the period from mid-1962 to mid-1966, will receive some payments. According to Judge Tyler, at least those members of the original class of 6,000,000 who "have maintained their odd-lot activity, will reap the benefits of any recovery" (52 F. R. D. at p. 265). As far as we are aware there has never been, nor can there ever be, a reliable or even rational estimate of how many traders, whether speculators or investors, can be said to be expected to continue as such after the lapse of 10 years or so. As it is suspected that relatively few claims will be filed and the damages assessed are supposed to cover the losses of "the class as a whole," there will be a huge residue, similar to the amounts paid to various charities "to advance public health projects" in the *Drug Cases*, and this residue is to be used for the benefit of all odd-lot traders by reducing the odd-lot differential "in an amount determined reasonable by the court until such time as the fund is depleted." 52 F. R. D. at p. 265. We are at a loss to understand how this is to be done, but it is suggested that it "might properly be done under SEC supervision or at least with SEC approval."

Despite its early expression of doubt on the subject,[9] and what appears at least to be *de facto* exercise of super-

9. According to the Report of the Special Study of Securities Markets, Vol. I, p. 182 (1963), an attorney representing the odd-lot firms presented a proposal for an increased differential. The Direc-

visory powers over Rules or practices on the subject of the amount and uniformity of the rate of commissions on odd-lot purchases and sales, the SEC finally did exercise such powers [10] and we hold that at all times the SEC possessed such powers under Sections 11(b) [11] and 19(b) [12] of the Securities Exchange Act of 1934. No District Court has authority to decide upon the rate of such commissions to take effect until the exhaustion of any residual fund left over by application of a "fluid recovery" in a private triple damage antitrust case, after the payment of claims in a class action or otherwise. The courts may review rulings of the SEC, but they have no more power than the District Court to fix any such rates in the first place or to give directions to the SEC concerning the fixing of such rates or the time within which such rates are to be effective, as part of a judgment in a private triple damage antitrust case.

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9. (Cont'd.)

tor of the Division of Trading and Exchange expressed some doubt as to the Securities and Exchange Commission's jurisdiction over the matter. The Report states that "(t)he Commission declined to decide the jurisdictional question but stated that it had no objection to the proposal. It is to be noted that neither the Exchange nor the Commission asserted jurisdiction, the former denying its jurisdiction and the latter expressing doubts, yet each informally acquiesced in the increase." See also p. 200 of the Report.

10. At the preliminary hearing defendants' Exhibit C contained a letter from the SEC to the New York Stock Exchange dated June 16, 1966. In part the letter stated that the "Commission hereby makes written request pursuant to section 19(b) of the Securities Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of odd-lot purchases and sales, and the fixing of reasonable rates of commission and other changes in connection therewith, to fix odd-lot differentials * * *."

11. 15 U. S. C., Section 78k(b).

12. 15 U. S. C., Section 78s(b).

II

Disposition of Certain Contentions of the Parties

Solely for the purpose of making our holdings clear in this difficult and complicated case we think it proper first to dispose of certain contentions of the parties.

A

We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. See *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281-2 (S. D. N. Y. 1971).

B

Moreover, we think the three cases cited by Judge Tyler as "respectable precedent" for fluid class recovery are all distinguishable. These three cases are: *Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir.), cert. denied, 373 U. S. 913 (1963); the *Drug Cases*, 314 F. Supp. 710 (S. D. N. Y.), aff'd 440 F. 2d 1079 (2d Cir.

1971); and *Daar v. Yellow Cab Company*, 67 Cal. 2d 695, 64 Cal. Rptr. 724, 433 P. 2d 732 (1967).

Judge Wyatt's extraordinary feat of judicial administration in carrying out the terms of the one hundred million dollar settlement in the *Drug Cases* deserves all the praise it has received. But it was a consensual affair made possible by the agreement of the parties and without objection to the assumption by the District Court of jurisdiction to accept and administer the fund. Here we have no fund. There is no settlement. Every issue is contested and litigated. And authority to permit this action to proceed as a class action must be found within the four corners of amended Rule 23, as interpreted in the Reviser's Note. Applying this test we hold Eisen's class action must be dismissed. *Bebchick* was not a class action in any sense of the word. Amended Rule 23 was not involved. In the exercise of its powers of review, the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court approving the action of the Public Utilities Commission of the District of Columbia supporting a fare increase by the transit company. In the meantime, the additional cash fares, now found to be illegal, had been collected. There was no way to direct refunds as those who paid these cash fares could not be identified. So, also in the exercise of its powers of review the Court of Appeals directed the amount of these additional cash fares to be set up in the books of the transit company to be used, in the discretion of the regulatory commission "to benefit bus riders as a class in pending or future rate proceedings." We cannot find that this case has any bearing on any of the issues in this amended Rule 23 case. Finally, *Daar* was a case arising under a state class action statute very different in its phraseology from amended Rule 23. The ruling was made on a demurrer to the com-

plaint so the approach to the legal issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met. Moreover, the court was evidently of the view that the individuals who had been damaged by the alleged overcharge in taxi fares would ultimately have to prove their separate and individual damages. 433 P. 2d at 740.

For the reasons stated in this opinion we disagree with the holding in the *Dolgow* cases.

C

The Merits of Eisen's Triple Damage Antitrust Claim

The defendants by extensive and even cogent arguments have urged us not only to vacate Judge Tyler's findings and conclusions on the merits of the case but to decide that there is no merit in Eisen's antitrust claim. Thus the defendants argue that in the context of an antitrust suit brought against defendants acting within a self-regulatory industry the *per se* rule of antitrust liability is inapplicable, and that even under a rule of reason the practices of the odd-lot defendants and the Exchange were not violative of the antitrust laws. In essence the defendants contend that Judge Tyler incorrectly applied the *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963) doctrine, and should have concluded that the fixing of the odd-lot differential is necessary to the proper implementation of the Securities Act. Also the defendants assert that the Securities and Exchange Commission has primary jurisdiction over the substantive issues presented in this litigation. As already appears in this opinion, we hold and decide that the SEC does possess supervisory powers over the amount and uniformity of the commissions to be paid on odd-lot purchases and sales. But this is only part of the picture. There

are many facets to this complicated case. We feel it is proper for us to say only that the record before us constitutes no proper basis for any decision of the merits, tentative or otherwise.

III

Controlling Principles

When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought. But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, clichés and rhetorical devices generally miss the mark. Something more substantial is necessary to establish a base for the proper decision of difficult and complex questions of law. One reason for this is that the solution is found more often than not by the application of fundamentally simple principles.

Thus statements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In cer-

tain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions,[13] including oppressions by those whose intentions may be above reproach.

We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that "such rules shall not abridge, enlarge or modify any substantive right."[14]

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13. The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." (*Burdeau v. McDowell*, 256 U. S. 465, 477 (1921) (dissenting opinion)). Justice Frankfurter also remarked that "(f)airness of procedure is 'due process in the primary sense * * *.' It is ingrained in our national traditions." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161 (1951) (concurring opinion)).

14. 28 U. S. C., Section 2072.

The applicable substantive law is Section 4 of the Clayton Act [15] that authorized the private triple-damage antitrust suit to recover damages by a person who has been "injured in his business or property" by reason of a violation of the antitrust laws. That the claims of many may not be treated collectively or as "the class as a whole" is what the Supreme Court decided in *Snyder v. Harris*, 394 U. S. 332 (1969), where plaintiff, in a diversity case sued as representative of a class of some 4000 shareholders of an insurance company. Her individual claim was for less than $10,000. She was not permitted to aggregate her claim with the separate claims of the other members of the class which amounted to $1,200,000. Despite the fact that amended Rule 23 was already in effect, the case was dismissed. Moreover, in the recent case of *Hawaii v. Standard Oil Co. of California, et al.*, 405 U. S. 251 (1972),[16] it was again held that only persons actually injured in their business or property could claim damages under the Clayton Act.

Eisen also alleges that the Exchange is liable for its failure to regulate the odd-lot differential as required by Section 6 of the Securities Exchange Act. He argues that Section 6, 15 U. S. C., Section 78f, requires the securities exchanges to prescribe rules and regulations for the regulation of the industry. Failure so to regulate allegedly subjects the defendant-Exchange to liability to those who have suffered injury due to the abdication of this regula-

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15. 15 U. S. C., Section 15.

16. The District Court in *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii, 1969) dismissed the class action allegation on the ground that "under the circumstances * * *, the class action based upon the injury to every individual purchaser of gasoline in the State, * * * in the context of the pleadings, would be unmanageable." Hawaii, however, decided not to appeal this ruling to the Ninth Circuit, and, of course, the ruling was not before the Supreme Court for review in *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 256, n. 6 (1972).

tory responsibility. The duty to regulate emanates from the Exchange Act, but the right of an injured party to recover damages is, according to Eisen, based upon federal common law, *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964); *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.), cert. denied, 323 U. S. 737 (1944). Thus, if Eisen is correct and Section 6 of the Act creates a statutory duty on the Exchange to protect members of plaintiff's class, then these members "may sue for injuries resulting from its breach and (the) common law will supply a remedy if the statute gives none," *Baird v. Franklin*, 141 F. 2d at 245.

The fundamental doctrine that permeates our opinion in *Eisen II*, and which we are now about to apply again in this same case, is whether the requirements of amended Rule 23 have been met. We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo*.

So, we shall proceed to examine in some detail the provisions of amended Rule 23 in the light of the long and explicit Advisory Committee's Note, 39 F. R. D. 98, and decide whether or not Judge Tyler has followed our directions to appraise and to apply each of the factors enumerated on the face of the Rule. In the light of our conclusions with respect to notice and manageability, we do not reach the subject of adequate representation.

IV

Lack of Individual Notice to "All Members Who Can be Identified Through Reasonable Effort"

Our prior ruling in *Eisen II* is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must

be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23(c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F. R. D. 106-7): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *."[17] While Judge Tyler seems to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statment that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action.

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17. The *Drug Cases, supra,* 314 F. Supp. 710 (S. D. N. Y. 1970), aff'd 440 F. 2d 1079 (2d Cir. 1971), contain nothing that gives support to Judge Tyler's ruling that individual notice to a limited number of members of a group of 2,250,000 whose names and addresses were identified was sufficient compliance with the notice requirements of amended Rule 23. An examination of the briefs in the *Drug Cases* makes it clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient. Moreover, as appellant in the *Drug Cases* attacked the sufficiency of the notice to the members of the wholesaler-retailer class, this Court rejected this argument, observing that individual notice was sent by mail to each and every member of this class whose name was available. 440 F. 2d at 1091.

V

The Preliminary Mini-Hearing on the Merits Was Not Authorized by Amended Rule 23 and the District Court Had No Jurisdiction or Competence to Hold Such a Hearing

The Federal Rules of Civil Procedure set forth a considerably variety of procedural devices designed for the disposition of cases on the merits. There may be traditional trials to a judge or to a judge and jury; there may be summary judgments, dismissals with or without prejudice for failure to state a claim and so on. But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

We agree with the ruling by the Fifth Circuit in *Miller v. Mackey International, Inc.*, 452 F. 2d 424 (5th Cir. 1971), that the preliminary hearing on the merits was improper. As stated by Judge Wisdom, 452 F. 2d at page 427:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

This was the first time, as far as we are aware, that any Court of Appeals has passed on the point. As noted by Judge Wisdom in footnote 5 on page 429 of 452 F. 2d, this Court did not have occasion to rule on the question when it decided the appeal from Judge Weinstein's summary judgment for defendants in *Dolgow*, 438 F. 2d 825 (2d Cir., 1971). While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing on the merits that had been conducted by Judge Weinstein. Nor was that question before this Court in *Green v. Wolf Corporation*, 406 F. 2d 291 (1968). See footnote 15 on pages 301-2.

Of the few District Court decisions on the point most of these disagree, as, of course, does the Fifth Circuit, with the innovations described in *Dolgow*,[18] and there is little to commend the reasoning or lack of reasoning in the others.[19] No provision is made in amended Rule 23 for

18. Decisions which have rejected the use of a preliminary hearing on the merits to decide the propriety of litigation proceeding as a class action include: *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir.), cert. denied 398 U. S. 950 (1970); *Katz v. Carte Blanche Corp.*, 52 F. R. D. 510 (W. D. Pa. 1971); *Fogel v. Wolfgang*, 47 F. R. D. 213 (S. D. N. Y. 1969); *Cannon v. Texas Gulf Sulphur Co.*, 47 F. R. D. 60 (S. D. N. Y. 1969); *Mersay v. First Republic Corp. of America*, 43 F. R. D. 465 (S. D. N. Y. 1968). Judge Mansfield took the opportunity in *Berland v. Mack*, 48 F. R. D. 121, 132 (S. D. N. Y. 1969) to comment on the preliminary hearing on the merits: "The suggestion that such abuse of the corporate treasury can be avoided by a preliminary hearing to determine the merits of the claim is illusory. Quite aside from the additional burden that it heaps upon the Court, it would be a rare case where the Court could assure the class of ultimate success even after a preliminary hearing."

19. Cases supporting a preliminary hearing on the merits are *Milberg v. Western Pacific Railroad Co.*, 51 F. R. D. 280 (S. D. N. Y. 1970), appeal dismissed, 443 F. 2d 1301 (2d Cir. 1971), and, of course, *Dolgow v. Anderson*, 43 F. R. D. 472 (E. D. N. Y. 1968).

any such mini, preliminary or other hearings on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.

Moreover, in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

VI

As a Class Action the Case Is Unmanageable

From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action. It turns out that he was right. As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures. The fact that the cost of obtaining proofs of claim by indi-

vidual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action. Other cases involving millions of diverse and unidentifiable members of an alleged class had been dismissed as unmanageable or altered in composition.[20] And so even *Eisen* and his counsel conceded that the class was not manageable unless the "fluid recovery" procedures were adopted.

Thus, in the language of Eisen's counsel:

> There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both Cherner v. Transitron Electronic Corporation, 201 F. Supp. 934 (D. Mass. 1962) and Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58 (7th Cir. 1939) (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar.

Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a

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20. See, *City of Philadelphia v. American Oil Co.*, 53 F. R. D. 45 (D. N. J. 1971); *United Egg Products v. Bauer International Corp.*, 312 F. Supp. 319 (S. D. N. Y. 1970); *Hackett v. General Host Corp.*, Civil No. 70-364 (E. D. Pa. 1970), appeal dismissed, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U. S. 925 (1972); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452, 461 (E. D. Pa. 1968); *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967).

farce.[21] And, when it comes to the filing and processing of claims, lawyers specializing in class actions have stated that the only effective way to induce any reasonable number of members of the class to file claims is to conduct ful-scale campaigns on TV and radio, solicit appearances by advocates of consumers' rights such as Ralph Nader, letters from Congressmen to their constituents, public statements by various state attorneys general "and coverage in various news media, union newsletters and the like," also to persuade the Federal Communications Commission to classify announcements of this character as "public service announcements."[22]

All the difficulties of management are supposed to disappear once the "fluid recovery" procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get

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21. Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). But in *Schroeder v. City of New York*, 371 U. S. 208, 212-213 (1962) the Court refined the *Mullane* rule: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

22. These suggestions were made and discussed in Shapiro, "Consumer Participation in Antitrust Class Action Part II", New York Law Journal, May 31, 1972, p. 1.

nothing.[23] We referred to this possibility in our opinion in *Eisen II* at pages 567 and 570.

But if the "class as a whole" is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of "the class as a whole."

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

VII

A Few General Observations

Perhaps in part due to the liberal views on the subject of amended Rule 23, as expressed in our opinion in *Eisen*

23. The recent draft for the *Manual for Complex Litigation* suggests that problems of administering the class action should not justify denial of an appropriate class action request "except when the attention and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled." (p. 36). Due to our rejection of the fluid class recovery concept, we are compelled to conclude that this litigation falls squarely within this exception contemplated in the Manual. The administrative problems posed by this action will frustrate any effort to provide the individual class members with compensation for the alleged injuries.

II, and doubtless stimulated by the counsel fees allowed in the *Transitron* and the *Drug Cases*, where large voluntary settlements had been approved and administered by District Judges, there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches, that the task of even attempting to enumerate all of these for purposes of documentation is too much for us.

Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought "on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and even all people in the United States."[24] So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alter-

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24. In the Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23 of the Federal Rules of Civil Procedure, issued March 15, 1972, this quotation appears on p. 6 with supporting citations.

native to complete ruin and disaster, irrespective of the merits of the claim.[25]

The "*in terrorem*" effects of the innovations described in *Dolgow* have been highly praised by those who invented or applied them.[26] But Professor Milton Handler, whose Annual Antitrust Review has for many years brought his expertise in Trade Regulation and, we are happy to say, some entertainment to the members of the Association of the Bar of the City of New York, and to the members of the Bench and Bar in general, minces no words. He calls these procedures "legalized blackmail."[27] There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the odd-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal

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25. *Id.*, at 16. See also, *Morris v. Burchard*, 51 F. R. D. 530, 536 (S. D. N. Y. 1971).

26. See, *Dolgow v. Anderson*, 43 F. R. D. 472, 487 (E. D. N. Y. 1968); Miller, *Problem In Administering Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F. R. D. 501, 508; Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Lawyer 1259 (1970).

27. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). See also, Professor Handler's 24th Annual Antitrust Review, 72 Colum. L. Rev. 1, 34-42, in which he criticizes the fluid recovery procedure as sought to be applied in "class" actions. There are some additional trenchant comments in his 25th Annual Antitrust Review, published in the December, 1972 issue of The Record of the Association of the Bar of the City of New York, pp. 660 ff.

charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.

Another possibility, suggested by the Report and Recommendations of the Special Committee of the American College of Trial Lawyers, is a further amendment to amended Rule 23 consisting of a new subdivision providing:

> In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more effectively served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of (b)(3).

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney's fees in such cases

should also provide adequate incentive to counsel for the representative or representatives of the class.[28]

Conclusion

For the reasons stated in this opinion the findings and conclusions following the mini-hearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

HAYS, *Circuit Judge*, concurring in the result:

I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 per cent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure.

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28. In his recent book FEDERAL JURISDICTION: A GENERAL VIEW, containing his 1972 Columbia University James S. Carpentier Lectures, Chief Judge Friendly makes this comment on class actions pursuant to amended Rule 23, at page 120, omitting footnotes:

> Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 24, 1973 DENYING MOTION FOR REHEARING IN BANC, CONCURRING OPINION OF JUDGE MANSFIELD, DISSENT OF JUDGE HAYS, AND DISSENTING OPINION OF JUDGE OAKES.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. 341—September Term, 1972.
(Filed May 14, 1973 Decided May 24, 1973.)
Docket No. 72-1521

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular

active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Chief Judge

KAUFMAN, Circuit Judge, with whom Judges FRIENDLY, FEINBERG, MANSFIELD, and MULLIGAN, concur.

I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. Judge Oakes's opinion, dissenting from the denial of en banc, illustrates some of the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future. En banc consideration by this court, however, would merely serve as an instrument of delay. Moreover, the application for certiorari will not go to the Supreme Court barren of the views of the judges of this court as, for example, in the Pentagon Papers case, where the court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position. Our decision to decline en banc consideration of this case in no way implies, as my brother Oakes suggests, the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead,

we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

MANSFIELD, *Circuit Judge:*

I concur in Judge Kaufman's opinion.

The issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible. If the recent history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court. See, e.g., *Rodriguez v. McGinnis,* 456 F. 2d 79 (2d Cir. 1972), *reversed sub nom. Preiser v. Rodriguez,* 41 U. S. L. W. 4555 (May 7, 1973). In the meantime one year's delay would be added to this already protracted proceeding. This predicament might be avoided by granting the petition and, with the case then before us *de novo,* invoking the Supreme Court's jurisdiction through the rarely used procedure provided by 28 U. S. C. § 1254(3), which empowers us *sua sponte* to certify grave questions to it for final decision where we believe the answers to be in doubt. See 28 U. S. C. Rules 28-29, Revised Rules of the Supreme Court (1973 Supp.); *Old Colony Trust Co. v. Commissioner,* 279 U. S. 716, 728-29 (1929). However, since I am persuaded that the Supreme Court, in view of the far-reaching significance of the issues, will in all likelihood grant certiorari, I believe that such a procedure is unnecessary. Otherwise I would agree with Judge Oakes' forceful plea for an *en banc* hearing.

HAYS, *Circuit Judge,* dissenting:

I believe that this case should be reconsidered en banc.

OAKES, *Circuit Judge* (dissenting from the denial of rehearing en banc), with whom Judge Timbers concurs:

For this court not to hear a matter of this significance is to render the en banc statute [1] a nullity. One may in this era of burgeoning appellate business quite plausibly take the view that the en banc procedure should not be used "merely" to correct individual injustices [2] or mistakes, but only in a case where the panel decision [3] is in serious conflict with prior decisions of the particular Circuit Court of Appeals or where it is of extreme importance. Even with that view, however, this case, if no other decided in recent years, qualifies for en banc treatment. I say this for the following reasons which I will enumerate, adding a few comments subsequently:

1. The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens.

2. The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23.

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1. Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

28 U. S. C. § 46(c).

2. Occasionally a vote to rehear a panel opinion en banc has been effective in the administration of individual justice. *See United States ex rel. Whitmore v. Malcolm*, No. 72-1706 (2d Cir., Jan. 22, 1973), slip op. at 1615 (2-1 decision), where following this court's vote to rehear en banc a panel opinion affirming a denial of habeas corpus and with the rehearing en banc pending before us, the State prosecutor dismissed the case against the appellant, thereby mooting the appeal.

3. I speak of a panel decision as one by three judges sitting on a Court of Appeals.

3. The case should be heard en banc; the procedure is there and presumably is to serve some purpose, and the Supreme Court has admonished the Courts of Appeal to make use of it.

4. There are no compelling reasons for not hearing the case en banc.

The Case Is of Extreme Importance; It Vitally Affects Class Actions.

I would expect that the case would be conceded by each and every one of the judges voting to deny en banc treatment, if he were polled, to be of extreme importance. Judge Kauman's opinion makes this concession.

The panel opinion defines as unmanageable any case involving a large class where actual notification of readily ascertainable members is expensive. It calls notice by publication to a large class a "farce" and casts constitutional doubts on any other construction of Rule 23. The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts.[4] The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, un-

4. I say "little people" because bigger investors don't generally deal in odd lots. They prefer to avoid the price differential in brokerage fees dealing in lots of 100 or more. It is interesting to contrast this case with *Lanza v. Drexel,* No. 35794 (2d Cir., Apr. 26, 1973), slip op. at 3033 (en banc), where this court did en banc and reverse a panel ruling that had a bearing, although in quite a limited factual situation in my opinion, on the liability for Securities Act violations of directors unconnected with management but highly involved financially. The panel opinion's decision here was partially reached in the name of fairness to defendants who thereby may retain, if the plaintiff's allegations are proven, profits obtained by violation of the antitrust laws. As I compute the cost of mailing readily identifiable members of the class from Judge Tyler's opinion, it was just over ten cents apiece or $218,750. 52 F. R. D. at 263.

hampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance.

The Panel Opinion Reaches a Very Doubtful Result.

To vote in favor of rehearing a case en banc should not necessarily mean that the judge is thereby committed to overturn the panel opinion as Judge Timbers pointed out dissenting from the denial of rehearing en banc in *Zahn v. International Paper Co.*, 469 F. 2d 1033 (2d Cir.), *rehearing en banc denied*, 469 F. 2d 1033, 1041, n. 1 (2d Cir. 1972) (dissenting opinion of Timbers, *J.*, joined by Oakes, *J.*), *cert. granted*, 41 U. S. L. W. 3441 (U. S., Feb. 20, 1973) (No. 72-888). At the same time, if one agrees fully with the panel decision one does not generally vote to hear it en banc. I take the view that it is only when there is reasonable doubt on a point, or the question or questions are unresolved in the judge's mind, that he should vote for en banc, and then only in unusual or extremely important cases, or cases which conflict with prior decisions of this circuit or the Supreme Court.

Serious questions about the panel's conclusions as to the management of class actions exist. Class actions, I had thought, were "an invention of equity . . . mothered by the practical necessity" of providing a praetical procedure to enable large numbers of litigants to enforce their common rights. *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182, 187 (8th Cir. 1948). *See* C. Wright, Federal

Courts 306 (2d ed. 1970); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 375 *et seq.* (1967). The panel's decision seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to Fed. R. Civ. P. 23.

The panel opinion is at the very least highly debatable on its face since it requires, without even considering division of a large class into a much smaller subclass under Rule 23(c)(4)(B), an individual plaintiff to pay the cost of actual notice to the identifiable members of the entire class which he seeks to represent and since it declares—I may add without any support or citation of authority whatsoever other than judicial fiat—that "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." Slip op. at 3239.

The view of *Eisen II*, 391 F. 2d 555 (1968), that Rule 23(c)(2) requires individual notice to all members of Eisen's class who can be identified through "reasonable effort" has been criticized as "unnecessarily restrictive . . . ." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 at 148 (1972); *see also* Kaplan, *supra*, 81 Harv. L. Rev. at 396; Comment, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969). Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice to those 2,000,000 or so "easily identifiable individuals" similarly situated, *Eisen v. Carlisle & Jacquelin*, 52 F. R. D. 253, 257 (S. D. N. Y. 1971), should not necessarily terminate the class action character of this suit. It may be appropriate, as

Judge Tyler suggested below, to charge the defendants with a portion of the notification costs. *See Dolgow v. Anderson,* 43 F. R. D. 472, 498-500 (E. D. N. Y. 1968) (Weinstein, *J.*); C. Wright, *supra* at 313-14. But even if these two questions were decided against the plaintiff, an en banc decision drawing sustenance from the flexible, still developing Rule 23 jurisprudence might embrace one of several other alternatives to the panel's burial of larger-number plaintiff class actions. These include the alternatives suggested by Judge Weinstein and others discarded in the panel opinion. But there are others, too.

The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. *See* Kaplan, *supra,* 81 Harv. L. Rev. at 390-91; Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L. Rev. 433, 438-54 (1960).

The problem of individualized notice under Rule 23 (c)(2) is so important to the future of class actions and the panel's resolution of it seems so inconsistent with the spirit of Rule 23, in short, that consideration by the full court seems essential.

At least as questionable is the panel's conclusion that this class action is unmanageable and should be dismissed because "no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class." Slip op. at 3238. The panel seems to intimate in a footnote that individualized notice to all 6,000,000 members of the class borders on being a constitutional require-

ment. Slip op. at 3239, n. 21. This intimation seems to me to be profoundly incorrect. In my view notice to class members who cannot be identified is not a constitutional requirement and not a prerequisite to a manageable class action. All that the due process clause requires is a procedure that "fairly insures the protection of the absent parties who are to be bound by [the judgment]." *Hansberry v. Lee,* 311 U. S. 32, 42 (1940) (not cited by panel decision). *See Mullane v. Central Hanover Bank and Trust Co.,* 339 U. S. 306, 313-14 (1950); *Northern Natural Gas Co. v. Grounds,* 292 F. Supp. 619, 636 (D. Kan. 1960). *See also* C. Wright, *supra* at 313; Kaplan, *supra,* 81 Harv. L. Rev. at 391-92. *But cf. Eisen II,* 391 F. 2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U. S. C. A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. *Mullane v. Central Hanover Bank and Trust Co., supra,* 339 U. S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation—the *Wall Street Journal, Business Week, Barron's,* the *New York Times* financial section, and the like—would reach most of the class.

To say, as the panel opinion says, slip op. at 3239, that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce," and to say it without any supporting data

or authority, strikes me as, in the words of the panel opinion, a "rhetorical device," slip op. at 3231. In this day and age of communications, why are such notices a "farce"? It may be that most people will not heed them—the sums may be too small to bother with, for example—but does this make the notices farcical? Probate notices published in small-town newspapers around the country are treated as notice to the whole world of possible creditors and heirs that an estate is being closed, and they are pretty effective for this purpose. Notice by publication of actions such as this in key, spot places can be, I should think, highly effective. If notice in the "Drug Cases," *State of West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S. D. N. Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U. S. 871 (1971), could work reasonably well, why can't it work with a somewhat more sophisticated group of consumers, odd lot buyers? Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.

The panel opinion's suggestion, slip op. at 3243, that it should "be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer" is in my view an abdication of judicial responsibility. It is as much as to say that the courts are insufficiently inventive to be capable of handling a matter—the distribution of unlawfully obtained money to a large number of people. I doubt this very much. I suspect that the courts can do the job.

All in all, it seems to me that the panel's decision not merely ossifies, but destroys, the development of what was

becoming an important procedural device for the airing of grievances where large numbers of people were affected and one individual did not have the resources to pursue his own legal rights to conclusion. At the very least the panel opinion should not be allowed to stand without full and complete consideration by the full active bench of this circuit, aided as we would be by the consultation and vote of the two distinguished senior judges who sat on the panel in question.

The Case Should Be Heard En Banc.

One can argue, as many wiser minds than the writer's have argued, that a court of appeals should never use the en banc procedure. The Learned Hand court was apparently able never to sit en banc. *See generally* M. Schick, Learned Hand's Court 105-06, 116-22 (1970). But this was before the number of judges on the court was expanded to meet the court's burgeoning business. In other words, it was when the court and its business were small enough to enable a good deal more consultation before adjudication among the judges on the court than now does or can occur. Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court. If panel decisions absent an en banc procedure were to be binding on the other members of the court (as with an en banc procedure this court has always treated them in the past), there would be (A) an even greater burden on the Supreme Court than it now has to correct egregious error or to examine important cases and (B) an individual active circuit court judge's vote would count, at least in the Second Circuit, in only the 160-220 cases per year on which he sits and be of no

significance whatever in the remaining 1,000± cases[5] coming before the court.

In the event this court's tradition were to be broken and an individual panel's determination were *not* to be binding on the rest of the court, the Supreme Court's burden would be equally great and this court would be even more fragmented. Its decisions would merit only the support that the persuasiveness of the individual opinion writer or the prestige of the particular panel could muster. There would be no "law of the circuit" as such. The district judges and others who look to the Court of Appeals for guidance in their decision-making would find none.

Thus it seems to me that the en banc procedure, or some viable substitute for it, is essential to ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals. The en banc power has received the imprimatur of an 8-1 Supreme Court, in a case that is still law, as "a necessary and useful power—indeed too [sic] useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 260 (1953). There are those of us, I suspect, who think the exercise of that power is one alternative preferable to the controversial national court of appeals which is receiving considerable attention these days.

The only viable alternative to the en banc procedure, if there is to be any genuine "court" position on a given case, is the prepublication circulation of all opinions for comment which is done in some circuits. This would be

5. For fiscal year 1972, an unusually light year in this circuit, there were a total of 1,317 filings and 177 appeals terminated without decision. 1973's figures indicate that about 1,200 cases will come before the court.

somewhat helpful but has the disadvantages of being advisory only, unless the en banc procedure is invoked; it also creates some work under the pressure of time deadlines additional to that which the en banc procedure permits. Prior circulation in seemingly important cases which is done in this circuit fairly frequently, with I think good result, but was not done in this particular case, has some merit, too; at least it may alert the whole court to an important case or the opinion writer or panel to some serious questions. Here even this alternative has been unavailable.

There Is No Good Reason for Not Hearing This Case En Banc.

There is no real pressure of time (the lapse of time since *Eisen II* is five years; the Supreme Court is unlikely to examine the inevitable petition for a writ of certiorari until four or five months from now),[6] that would, as to some extent it did in the Pentagon Papers case,[7] make en banc rehearing or opinion writing unfeasible. There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such.

It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it, than what is now the Second's, before

6. We are told that the average en banc proceeding takes about 155 days. This is not really necessary in my view but in this case would not be too harmful.

7. *United States v. New York Times Co.*, 444 F. 2d 544 (2d Cir. 1971), *rev'd*, 403 U. S. 713 (1971).

it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.

I believe in short that our duty is to hear this case en banc. Since the panel opinion sounds the "death knell," *see Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. denied*, 386 U. S. 1035 (1967), for consumer and environmental class actions, the omission to do so is to my mind grievous. Perhaps, however, it will serve as a vehicle for a higher authority to tell us whether the admonitions of *Western Pacific Railroad Corp. v. Western Pacific Railroad Co., supra*, relative to the en banc procedure still have any meaning. If they do not, the world may not come to an end, but we will be an interesting court to watch as our eight active and six senior and numerous visiting and district judges go from decision to decision, guided 2 per cent [8] of the time by a grant of certiorari. We will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was.

8. From information furnished by the Circuit Executive of our court, in fiscal year 1972 there were 369 petitions for certiorari from the Second Circuit filed and only 18 granted. In fiscal year 1973, 284 petitions have been filed and only 12 granted. If in forma pauperis petitions are included as cases heard by our court, the percentage of certiorari grants is closer to 1.

ITEMIZED BILL OF COSTS FILED BY DEFENDANTS-APPELLEES IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON MAY 15, 1973.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Judgment having been entered in the above-entitled action on May 1, 1973, reversing the rulings of the District Court which sustained the prosecution by plaintiff of the case as a class action, the Clerk is requested to tax the following as the costs of the defendants on appeal:

Docket Fee	$ 25.00
Bar Press, Inc.—printing Appendix (annexed hereto as Exhibit "A" and made a part hereof is a copy of Bar Press, Inc.'s bill dated July 31, 1972 for printing said Appendix)	$ 4,185.31
Bar Press, Inc.—printing defendants' joint Main Brief (annexed hereto as Exhibit "B" and made a part hereof is a copy of Bar Press, Inc.'s bill dated July 31, 1972 for printing said Main Brief)	$ 4,541.08
Bar Press, Inc.—printing defendants' joint Reply Brief (annexed hereto as Exhibit "C" and made a part hereof is a copy of Bar Press, Inc.'s bill dated October 23, 1972 for printing said Reply Brief)	$ 1,999.95
Bar Press, Inc.—printing defendants' joint Supplemental Statement (annexed hereto as	

Exhibit "D" and made a part hereof is a copy of Bar Press, Inc.'s bill dated January 16, 1973 for printing said Supplemental Statement)	$ 845.40
Total:	$11,596.74

Carter, Ledyard & Milburn
By Louis L. Stanton, Jr.
A Member
Attorneys for Defendant-Appellee
Carlisle & Jacquelin
2 Wall Street
New York, New York 10005

Kelley Drye Warren Clark Carr & Ellis
By Brad G. Holman
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New York, New York 10022

Milbank, Tweed, Hadley & McCloy
By William E. Jackson
A Member
Attorneys for Defendant-Appellee
New York Stock Exchange, Inc.
One Chase Manhattan Plaza
New York, New York 10005

VERIFICATIONS

State of New York)
County of New York) ss.:

LOUIS L. STANTON, JR., being duly sworn, deposes and says:

I am a member of the firm of Carter, Ledyard & Milburn, attorneys for defendant-appellee Carlisle & Jacquelin and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the services for which fees have been charged were actually and necessarily performed.

LOUIS L. STANTON, JR.
Louis L. Stanton, Jr.

Sworn to before me this 14 day of May, 1973.

DOROTHY MOROSI
Notary Public, State of New York
No. 24-2773675
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

BUD G. HOLMAN, being duly sworn, deposes and says:

I am a member of the firm of Kelley Drye Warren Clark Carr & Ellis, attorneys for defendant-appellee De-Coppet & Doremus and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the services for which fees have been charged were actually and necessarily performed.

BUD G. HOLMAN,
Bud G. Holman.

Sworn to before me this 9th day of May, 1973.

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1974

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

RUSSELL E. BROOKS, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley and McCloy, attorneys for defendant-appellee New York Stock Exchange, Inc., and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the srvices for which fees have been charged were actually and necessarily performed.

RUSSELL E. BROOKS,
Russell E. Brooks.

Sworn to before me this 11th day of May, 1973.

ROSEMARIE D. IOVINO
Notary Public, State of New York
No. 24-7039475
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1974

EXHIBIT "A".

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EXHIBIT "C".

TELEPHONE WO 6-3906

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EXHIBIT "D".

TELEPHONE WO 6-3906

BAR PRESS, Inc.

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New York, New York

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		$845.40

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 24, 1973 DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
A. Daniel Fusaro,
Clerk.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 24, 1973 DENYING PETITION FOR REHEARING IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY,
Henry J. Friendly,
Chief Judge.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 18, 1973 STAYING ISSUANCE OF THE MANDATE.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 30, 1973, to stay the issuance of the mandate and entry of the itemized and verified bill of costs filed May 15, 1973, to and including July 30, 1973 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that no bond will be required pending application to the Supreme Court for certiorari.

/s/ HAROLD R. MEDINA,
Harold R. Medina,
/s/ J. EDWARD LUMBARD,
J. Edward Lumbard,
/s/ PAUL R. HAYS,
Paul R. Hays,
Circuit Judges.

June 18, 1973

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007

HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
1700 Market Street,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner Morton Eisen prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1973, which reversed two orders of the United States District Court for the Southern District of New York holding that Petitioner's action was maintainable as a class action, and that defendants should bear part of the cost of notifying the class. The Court of Appeals denied a petition for rehearing in banc on May 24, 1973 by a five to three vote. Petitioner also seeks review of the March 8, 1968 decision of the Court of Appeals holding that notice of the pendency of a class action is required in cases maintained under Rules 23(b)(1) and 23(b)(2) as well as in those maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure (hereinafter "Rule 23").

The following opinions and orders of the Court of Appeals for the Second Circuit are not yet officially reported. They are printed in the Appendix as indicated.

(1) Opinion of May 1, 1973 reversing the order of the district court (Medina and Lumbard, Circuit Judges, per Medina, J.) at 92a-120a.[1]

(2) Concurring opinion of Judge Hays of May 1, 1973 at 120a.

(3) Opinion of May 24, 1973 denying rehearing in banc (Kaufman, Circuit Judge, Judges Friendly, Feinberg, Mansfield and Mulligan, concurring) at 121a-122a.

(4) Concurring opinion of Judge Mansfield on denial of rehearing at 123a.

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1. Page references are to the pages of the Appendix, separately presented pursuant to rule 23(i) of the Rules of this Court.

(5) Dissent of Judge Hays from denial of rehearing at 123a.

(6) Dissent of Judge Oakes (Judge Timbers concurring) from denial of rehearing at 123a-134a.

(7) Order of the Court of Appeals dated May 1, 1972 (Medina, Lumbard and Hays, Circuit Judges) granting defendants' motion to require the District Court clerk to certify and transmit the record to the Court of Appeals at 88a.

(8) Order of the Court of Appeals dated June 29, 1972 (Medina, Lumbard and Hays, Circuit Judges), denying plaintiff's motion to dismiss the appeal filed by defendants on May 2, 1972 from the orders of the District Court at 91a.

Earlier opinions in this litigation are reported at 41 F. R. D. 147 (S. D. N. Y. 1966); 370 F. 2d 119 (2d Cir. 1966), *cert. denied,* 386 U. S. 1035; 391 F. 2d 555 (2d Cir. 1968); 50 F. R. D. 471 (S. D. N. Y. 1970); 52 F. R. D. 253 (S. D. N. Y. 1971); and 54 F. R. D. 565 (S. D. N. Y. 1972). Except for the opinions reported at 41 F. R. D. 147 and 50 F. R. D. 471, they are printed in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1973. A timely petition for rehearing, containing a suggestion that the action be reheard in banc, was filed on May 11, 1973, and was denied on May 24, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Should a class action maintainable under Rule 23 be dismissed because the individual class representative cannot afford to pay for individual notice of its pendency to two million identifiable class members?

2. Is individual notice to two million identifiable class members required by due process or Rule 23, where the statute of limitations has run on the damage claims of the class, so that their interest in electing exclusion from the class is minimal?

3. Is due process satisfied in a class action maintained under Rule 23 by adequacy of representation and published notice rather than individual notice?

4. Is notice of the pendency of a class action required in a class action maintained under Rule 23(b)(1) or (2) of the Federal Rules of Civil Procedure?

5. Does Rule 23 or due process preclude the District Court from allocating the cost of the class action notice among the parties, on the basis of the probability of the plaintiff's success on the merits, as determined in a preliminary evidentiary hearing?

6. Did the Court of Appeals err in holding the class action to be unmanageable prior to trial on the issue of liability, even though fifty six percent of the transactions of the class are preserved on computer records?

7. Did the Court of Appeals err in rejecting out-of-hand a possible form of class action relief under which defendants might be required to disgorge the fruits of their antitrust and Securities Act violations under the so-called "fluid recovery" theory?

8. Did the Court of Appeals apply an improper standard of review in denying to the District Court broad discretion in making a class action determination under Rule 23?

9. Did the Court of Appeals have jurisdiction of defendants' appeal from the class action determination of the District Court, where no final order had been entered and leave to appeal had not been obtained under 28 U. S. C. Section 1292(b)?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa (the "Exchange Act"), and 28 U. S. C. §§ 1291 and 1292(b).

The text of Rule 23 is as follows:

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative

parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the

difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular

issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

* * *

The texts of the Fifth Amendment and the statutory provisions are printed in the Appendix.

STATEMENT OF THE CASE.

The Complaint.

The complaint alleges that in the period 1962-1966 the two odd-lot brokerage firm defendants (Carlisle & Jacquelin and DeCoppet & Doremus, hereinafter "the odd-lot defendants"), who controlled ninety-nine percent of the odd-lot business, illegally fixed the odd-lot differential charged to the investing public at an excessive level in violation of the federal antitrust laws, and that such price-fixing was done with the acquiescence of the defendant New York Stock Exchange (hereinafter the "Exchange") in disregard of its regulatory and fiduciary duties to investors, in violation of the Securities Exchange Act of 1934 ("Exchange Act").[2] The Complaint requests treble damages and injunctive relief for defendants' antitrust violations, and damages and injunctive relief against the Exchange for violation of the Exchange Act. The District Court's jurisdiction was based on 28 U. S. C. § 1337. The action arises under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and under Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa.

The Class Action.

The action was brought on May 2, 1966 as a class action on behalf of all persons who were forced to pay the differential. On September 27, 1966, the District Court

2. Odd-lots are shares traded in lots of less than a hundred. Shares traded in multiples of a hundred are round lots. During the period 1962-1966 the odd-lot differential (a surcharge in addition to the standard commission imposed on odd-lot transactions) was 12½ cents per share on all stocks selling below $40 per share and 25 cents per share on all stocks selling at or more than $40 per share; on July 1, 1966 the "break point" was raised to $55 per share.

dismissed the action as a class action (41 F. R. D. 147). Plaintiff appealed the dismissal to the Court of Appeals for the Second Circuit. Defendants' motion to dismiss the appeal as not being taken from a final order was denied, on the ground that dismissal of the class action was the "death knell" of the entire action, and was, therefore, a final appealable order (1a-4a). This Court denied certiorari. 386 U. S. 1035. By opinion dated March 8, 1968, the Court of Appeals reversed the District Court's original dismissal of the action as a class action and held that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)[3] except that a further evidentiary hearing would be required with respect to the issues of "notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (5a, 28a). The Court of Appeals stated:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (7a).

The Court further stated:

> ". . . courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants." (21a).

Moreover, the Court held that Rule 23 "should be given a liberal rather than a restrictive interpretation." (14a).

3. The Court of Appeals held that the class action was not maintainable under Rule 23(b)(1) or (b)(2).

The District Court Hearings.

On remand the District Court held two sets of hearings. The first dealt with whether the case could be maintained as a class action. On the basis of a complete record, in which most of the facts were stipulated, the District Court held that the prerequisites to maintenance of a class action were satisfied.

The District Court, heeding the Court of Appeals' admonition that Rule 23 was intended "to provide a thoroughly flexible remedy" (8a), held that: "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof . . .", deeming it "appropriate . . . to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial planning stage, an inflexible mold of recovery running to specific class members." "Fluid recovery" would be accomplished by establishing a fund equivalent to the amount of unclaimed damages and reducing the odd-lot differential on future transactions in an amount determined reasonable by the Court until the fund was depleted. The District Court emphasized, however, that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder." (49a-50a). The District Court also found, by analyzing the record in other class actions, that the expense of administration would not engulf the prospective recovery (45a-47a, 51a).

The Class Notice.

The District Court held that the requirements of due process and Rule 23(c)(2) would be satisfied by publication in the national edition of the Wall Street Journal and

in New York, San Francisco and Los Angeles newspapers, supplemented by mailing of an initial individual notice to the most active members of the class, followed by more extensive notice in the event that the defendants were found liable. The court accordingly ordered individual notice to be sent "to the approximately 2,000 or more class members who had ten or more transactions during the relevant period."[4] This notice program was tailored to the Court of Appeals' suggestion that the notice effort should be concentrated upon those class members who may have "enough of a stake in the proceedings to justify personal intervention . . ." (26a). The District Court further directed: "[I]n order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random from the 2,000,000 persons and firms who are identifiable." In addition, the District Court noted that plaintiff had offered to send copies of the notice to all member firms of the Exchange and to all commercial banks with large trust departments. Plaintiff also suggested that the notice could be included in the confirmations and monthly statements sent to their customers by the member firms (54a-56a).

Having decided that the requirements of Rule 23 for maintenance of a class action were satisfied, the District Court proceeded to deal with the question who should bear the cost of notice to the class, reasoning that: "If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a

4. This figure was based only on a representative sample of four of the fourteen wirehouses which had such tapes. The District Court assumed that a survey of the remaining tapes would turn up more than the 2,000.

restrictive interpretation. Eisen II at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim" (58a). As a solution the court decided to hold a preliminary hearing for the purpose of determining whether plaintiff's chance of success on the merits was sufficient to justify imposing the cost of notice on the defendants.

The Evidence of Defendants' Liability.

On the basis of a record, most of which consisted of the defendants' own documents which they put in evidence themselves, the District Court found that plaintiff and the class "are more than likely to prevail at trial or upon a motion for summary judgment" (86a). The court found that plaintiff had made a strong showing that the odd-lot defendants had engaged in price-fixing, market division, and other anti-competitive practices, none of which was exempt from the antitrust laws. Counsel for the odd-lot defendants admitted that the differential was the result of "most intense negotiation between the odd-lot houses among themselves. . . ." The two firms always charged exactly the same differential, and when the differential was changed, each firm changed it identically at the identical moment. They claimed that they were entitled to "a special exception" that made compliance with the federal antitrust laws unnecessary. The District Court found that no special exception was warranted.

The District Court likewise found that the plaintiff had presented "excellent evidence" of liability against the Exchange, resulting primarily from the Exchange's failure to prevent the odd-lot defendants from charging their excessive differential to the public (86a).

Accordingly the District Court imposed 90% of the total notice cost of $21,720 on the defendants (87a).

The Court of Appeals Decision.

Following the District Court's order allocating ninety percent of the cost of notice to them, the defendants obtained an order from the Court of Appeals on May 1, 1972 (over plaintiff's objection that the Court of Appeals had no jurisdiction to enter such an order) directing the Clerk of the District Court to certify and transmit the record for review (88a). Thereafter, defendants also filed a notice of appeal from the orders of the District Court. Plaintiff moved to dismiss the appeal as not being taken from a final order. The motion was denied on June 29, 1972 (91a).

On May 1, 1973 the Court of Appeals (Medina and Lumbard, Circuit Judges; Hays, Circuit Judge, concurring in the result) reversed the orders of the District Court which had sustained the prosecution of the case as a class action, and dismissed the case as a class action.

The Court of Appeals held:

1. In virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3)—and whether plaintiff's claim appears to be meritorious or not—plaintiff must send and pay for individual notice to every class member who can be identified (97a, 109a).

2. The District Court has no discretion under Rule 23 to fashion an equitable remedy appropriate to the kind of wrong and the type of class involved; rather, unless precise repayment can be made to every person who suffered from the alleged wrong, no repayment need be made at all. Hence, even the theoretical possibility of a "fluid class" recovery was rejected (116a).

3. In addition to rejecting the "fluid class theory", the Court held the class action unmanageable, even though 56% of the challenged transactions are recorded on com-

puter tapes, so that class members could be repaid directly and precisely with regard to those transactions (35a).

4. Any kind of newspaper notice is "a farce" (114a); due process and Rule 23 require that every class member must receive individual notice of the pendency of the action (109a, 114a).

5. The merits of the case are irrelevant; no matter how apparent and gross the wrong, a class action cannot be maintained unless plaintiff first gives and pays for individual notice pursuant to Rule 23(c)(2). The District Court has no jurisdiction either to evaluate the merits of plaintiff's claim or to allocate the cost of notice (112a).

Judge Hays concurred in the result, "unable to accept the ruling of the district court requiring the defendants to pay ninety percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure." Judge Hays was presumably referring only to the notice as ordered by the District Court. He did not join the majority in holding that 2,000,000 individual notices were required (120a).

The Petition for Rehearing in Banc.

Plaintiff petitioned the Court of Appeals for a rehearing in banc. Five members of the Court (per Judge Kaufman with Judges Friendly, Feinberg, Mansfield and Mulligan concurring) voted to deny rehearing only because "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. . . . [W]e wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." (122a).

Judges Hays, Oakes and Timbers voted for a rehearing in banc. Judge Oakes (with Judge Timbers concurring) filed an opinion which states:

1. "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens."

2. "The panel opinion reaches a result which is very doubtful to say the least; on its face it appears to nullify much of Fed. R. Civ. P. 23." (124a).

3. "The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance." (125a-6a).

4. Notice by publication is not "a farce", but is rather, "highly effective" (129a-130a).

5. The panel opinion "not merely ossifies, but destroys" class actions, an important procedural device. (130a).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

This case involves questions of the greatest importance in the administration of class actions under Rule 23 of the Federal Rules of Civil Procedure. The petition comes before the Court with extraordinary credentials. As noted above, Judge Kaufman expressed the view of the five judges of the Court of Appeals who voted to deny rehearing in banc that "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction." (122a). The Court decided against a rehearing in banc because it desired to "speed this case on its way to the Supreme Court." (122a). Judge Oakes' dissent (Judge Timbers concurring) agreed: "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens." (124a).

The questions of notice to the class and manageability presented by this case go to the heart of Rule 23. They should be resolved by this Court, because they affect virtually all class actions now pending in the federal courts, including such vast and notorious cases as those arising out of the collapse of Penn Central, Equity Funding Corporation and National Student Marketing Corporation.

The defendants represented to the Court of Appeals that it "should review now this very important and devel-

oping area of the law that is now at the crossroads . . ."[5] Thus, the importance of the questions raised is not in dispute.

II.

The Court of Appeals Has Decided Federal Questions in a Way in Conflict With Applicable Decisions of This Court.

The Court of Appeals' decision conflicts with applicable decisions of this Court on notice as a requirement of due process and the scope of Rule 23 as an instrument of antitrust and Securities Act enforcement.

A. Individual Notice Is Not Required by Due Process

The Court of Appeals holding that individual notice must be sent to every single class member, conflicts with this Court's decision in *Hansberry v. Lee*, 311 U. S. 32, 41-43 (1940). In *Hansberry* this Court held that since "[t]he class suit was an invention of equity", a decision would be binding on all class members whether they were technical parties or not and whether they had notice or not, provided only that the class is adequately represented by a litigant with "a common interest". Since the Second Circuit did not reverse the finding of the District Court that Eisen would fairly and adequately represent the class, (42a) it necessarily follows, under *Hansberry*, that notice to each class member is not required for the case to proceed.

Further, in *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 313-4 (1950), this Court said: "A construction

5. April 11, 1972 affidavit of William E. Jackson in support of defendants' motion seeking review of the District Court's class action determinations.

of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Yet that is precisely what the Court of Appeals has done here.

B. Rule 23 Should Be Given Broad Scope as an Instrument of Antitrust and Securities Act Enforcement.

The decision of the Court of Appeals destroys the effectiveness of Rule 23 as a means of vindicating the high public purpose inherent in private enforcement of the federal antitrust and securities laws, in conflict with applicable decisions of this Court.

In *State of Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), Hawaii had argued that ". . . the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and [that] . . . denying Hawaii the right to sue for injury to her quasi-sovereign interests . . . [would therefore] allow antitrust violations to go virtually unremedied . . ." This Court responded:

> "Private citizens are not as powerless, however, as the State suggests.
>
> "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 265-66.

The *Eisen* decision rejects the role assigned to treble damage plaintiffs as "private attorneys-general", a function

equally fulfilled in private enforcement of the Exchange Act. *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134, 138-9 (1968); *J. I. Case Co. v. Borak*, 377 U. S. 426, 432 (1964).

The *Eisen* decision seriously limits private enforcement of the federal antitrust and securities laws and holds that there is nothing the federal courts can do "in situations where immense numbers of consumers have been mulcted in various ways by illegal charges." (118a). The *Eisen* decision holds that for such wrongs there is a "lack of adequate remedy under existing laws." (118a). This ignores the equitable origin and character of the class action, recognized by this Court in *Hansberry v. Lee, supra*, 311 U. S. at 41, and *Smith v. Swormstedt*, 57 U. S. 288 (1853).

With respect to plaintiff's Exchange Act claims, the decision is contrary to the unanimous holding of this Court in *J. I. Case Co. v. Borak, supra*, that: ". . . it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." This Court stated:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U. S. 678, 684 (1946). . . . Section 27 grants the District Courts jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this title. . . .'" 377 U. S. at 433.

The *Eisen* decision also conflicts with this Court's decision in *Hanover Shoe Co. v. United Shoe Machinery*

Corp., 392 U. S. 481 (1968), in which the Court refused to countenance a result whereby ". . . those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." 392 U. S. at 494. This Court noted that the class sought to be protected in *Hanover Shoe*, the "ultimate consumers", do not usually bring class actions, and so permitted a plaintiff, which may have passed on its damages, to bring the action. In *Eisen* the consumers themselves have sued; *a fortiori* they should be allowed to continue the action.

Hanover Shoe itself followed the holding in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 265 (1946) in which this Court reaffirmed that:

> " 'The constant tendency of the Courts is to find some way in which damages can be awarded where a wrong has been done.' "

In light of the conflict with such fundamental decisions of this Court, the *Eisen* decision should not be allowed to stand.

III.

The Eisen Decision Is in Conflict With Decisions of Other Courts of Appeals, as Well as Creating a Conflict Within the Second Circuit Itself.

The *Eisen* decision conflicts with the decisions of other Courts of Appeals on such fundamental questions as the need for notice in Rule 23(b)(1) and (2) cases, the discretion afforded to district courts in their class action determinations, and the appealability of class action determinations; and the *Eisen* decision also conflicts with the decision of another panel of the Second Circuit on the basic questions of notice by publication and the use of the fluid class theory.

A. The Fourth Circuit Has Held, Contrary to Eisen, That Notice Is Not Required in a 23(b)(2) Class Action.

The Court of Appeals held categorically in its 1968 Opinion that notice of the pendency of the action is required in all class actions, even those brought under Rule 23(b)(1) or (2) (16a-17a). The Fourth Circuit, in *Hammond v. Powell*, 462 F. 2d 1053, 1055 (4th Cir. 1972) ruled exactly the other way:

> "Furthermore, since this class action plainly comes within the ambit of F. R. Civ. P. Rule 23(b)(2), the notice requirement of Rule 23(c)(2) does not apply."

Since many important class actions fall within the scope of Rule 23(b)(2), including Eisen and most civil rights cases, this Court should resolve this conflict.

B. The Third and Tenth Circuits Have Held, Contrary to Eisen, That the District Court Must Be Allowed Broad Discretion in Class Action Determinations.

The *Eisen* decision is in conflict with a recent decision of the Third Circuit, *Katz v. Carte Blanche Corporation*, — F. 2d — (3d Cir. 1973) (Petition for Rehearing In Banc granted, June 20, 1973).[6] The essence of the *Katz* decision is that "great deference" should be given a District Court's class action determination. *Eisen* is directly to the contrary. In *Katz* the Court stated the issues on appeal as follows:

> "(1) the standard to be applied . . . in reviewing the district court's pretrial grant of the class action; and
>
> "(2) under that standard, whether the district court erred in granting the motion."

6. The decision is not yet officially reported. It is printed in the Appendix at 135a-145a.

Under Rule 23 the district court retains discretion to modify its class action determination at any time before a final decision on the merits. The Third Circuit held that:

> "The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appeal has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only, then will this court intercede."

The Court of Appeals for the Tenth Circuit has manifested the same view, albeit in affirming disallowance of a Truth-in-Lending class action. *Wilcox v. Commerce Bank of Kansas City*, 474 F. 2d 336 (10th Cir. 1973). The Court regarded as the "seemingly most sensible alternative" that ". . . trial courts be permitted in the exercise of sound discretion to determine within broad and open-ended guidelines whether . . . [class action treatment] is superior to other available methods for the fair and efficient adjudication of the controversy on a case by case basis." 474 F. 2d at 348. Further, the Court stated: "We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical ap-

plications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case." Id. at 349.

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . . ." What is "the best notice practicable" and what constitutes "reasonable effort" are plainly determinations which lie within the sound discretion of the District Court. Likewise, "fluid recovery" was not inflexibly adopted by the District Court, to the exclusion of individual claims (50a). Indeed, 56 percent of the odd-lot transactions on the Exchange were recorded on computer tapes and could clearly form the basis for individual recoveries (35a).

The *Eisen* decision inflexibly holds that there is no area within which the District Court's discretion may operate.

C. "Fluid Recovery" and Notice by Publication Have Previously Been Approved by the Second Circuit.

The *Eisen* decision conflicts with the decision of another panel of the Second Circuit approving both a fluid recovery and notice by publication to the consumer class in the tetracycline price-fixing litigation. On the question of notice, the Court held "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action notice by publication was obviously the only practical alterna-

tive."[7] *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090 (2d Cir.), *cert. denied, sub nom.; Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U. S. 871 (1971). The need for individual notice, to enable individual class members to elect exclusion from the class, to press their own claims, is minimal in *Eisen*, where the statute of limitations has run on the damage period.

The conflict within the Circuit is emphasized by the statement in Judge Kaufman's opinion, denying rehearing in banc, that: ". . . the application for certiorari will not go to the Supreme Court barren of the views of the judges of this Court, as, for example, in the Pentagon Papers case, where the Court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position" (122a). Furthermore, Judge Hays, who concurred only in the result of the panel's decision, on the ground that the defendants should not be required to pay for any part of the cost of the notice as ordered by the District Court, presumably did not agree that 2,000,000 individual notices were required. The Court of Appeals did not choose to resolve this intramural conflict, confident that this Court would grant certiorari.

In *Eisen*, the Court of Appeals, which in its 1968 opinion held that Rule 23 was to be "given a liberal rather than a restrictive interpretation" (14a) has now shackled the district courts, depriving them of their broad discretion and substituting its own now narrow views of the Rule. In Judge Oakes' view: "The panel's decision seems utterly inconsistent with the flexible, equitable spirit that moti-

7. The Court's approval of the class aspects of the case was a necessary predicate to its approval of the settlement that was being appealed. 440 F. 2d at 1089. It is thus immaterial that the case was decided in a settlement, rather than a litigation context.

vated the innovative 1966 amendments to Fed. R. Civ. P. 23." (127a). The conflict between circuits and within the Second Circuit itself should be resolved by this Court.

D. The Court of Appeals Had No Jurisdiction of Defendants' Appeal.

The Court of Appeals allowed the appeal from the District Court to go forward on two bases, both of which are erroneous and in conflict with the decision of another circuit, as well as with other decisions within the Second Circuit.

As a first basis of jurisdiction the Court of Appeals relied on the statement in its 1968 decision that "we retain jurisdiction" (28a, 94a). But because the Court of Appeals sent down its mandate in 1968, reversing the District Court, there was no jurisdiction for the Court to "retain". Such is the precise holding of the Fifth Circuit in *Meredith v. Fair,* 306 F. 2d 374, 376 (5th Cir. 1962). The Second Circuit itself had reached the same conclusion earlier. *In re Nevada-Utah Mines & Smelters Corp.,* 204 Fed. 982, 983 (2d Cir. 1913).

The other ground upon which the Court asserted jurisdiction of the present appeal was defendants' notice of appeal pursuant to 28 U. S. C. § 1291 (89a, 94a). Other circuits are unanimous that class action determinations are not final orders, and are not subject to interlocutory appeal, absent certification under 28 U. S. C. § 1292(b). See, *e.g. Weingartner v. Union Oil Co. of California,* 431 F. 2d 26 (9th Cir. 1970) *cert. denied,* 400 U. S. 1000 (1971); *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969) and *Hackett v. General Host Corp.,* 455 F. 2d 618 (3d Cir.), *cert. denied,* 407 U. S. 925 (1972). Except for the narrow "death knell" exception, the Second Circuit has itself consistently held that class action determinations are not appealable final

orders. *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F. 2d 770 (2d 1972); *Pfizer, Inc. v. Lord*, 449 F. 2d 119 (2d Cir. 1971); *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *Caceres v. International Air Transport Ass'n.*, 422 F. 2d 141 (2d Cir. 1970); *City of New York v. International Pipe and Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1969). For the first time since the adoption of Rule 23, the *Eisen* decision squarely holds all class action determinations to be routinely appealable (94a). This erroneous jurisdictional holding invites a further and unnecessary increase in the caseload of the already burdened Courts of Appeals.

IV.

Neither Rule 23 Nor Due Process Precludes the District Court From Allocating the Cost of Notice Between the Parties, on the Basis of a Preliminary Evidentiary Hearing on the Plaintiff's Probable Success on the Merits.

The plaintiff's financial ability to furnish notice to the class is not included in Rule 23 as a prerequisite to maintenance of a class action, or even as a factor to be considered in deciding whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(c)(2), the only part of the Rule which requires the giving of notice, and which presupposes that an action has already been determined to be properly maintainable as a class action under 23(a) and (b), provides that the court shall direct notice to the class. It does not provide that the court shall direct the plaintiff to furnish the notice.

Numerous district court decisions have taken this to mean that it is proper to allocate the cost of notice between the parties. *Dolgow v. Anderson*, 43 F. R. D. 472 (E. D.

N. Y. 1968); *State of Minnesota v. U. S. Steel Corp.*, 44 F. R. D. 559 (D. Minn. 1968); *Bragalini v. Biblowitz*, 1969-1970 Fed. Sec. L. Rep. ¶ 92,537 (S. D. N. Y. 1969); *Berland v. Mack*, 48 F. R. D. 121 (S. D. N. Y. 1969); *Feder v. Harrington*, 52 F. R. D. 178, 184 (S. D. N. Y. 1970); *Miller v. Alexander Grant & Co.*, 1971-72 Fed. Sec. L. Rep. ¶ 93,287 (E. D. N. Y. 1971); *Mack v. General Electric Co.*, Civil Action No. 69-2653 (E. D. Pa., Order of September 7, 1971); *Lamb v. United Security Life Company*, 1971-1972 Fed. Sec. L. Rep. ¶ 93,489 (S. D. Iowa 1972); *Ostapowicz v. Johnson Bronze Co.*, 15 F. R. Serv. 2d 1249 (W. D. Pa. 1972).

In *Berland v. Mack, supra*, Judge Mansfield (then on the District Court) stated:

> "[W]e do not believe that Eisen established a hard and fast rule to the effect that the plaintiff must initially lay out the cost of notice. We have repeatedly been advised that flexibility is important to the proper application of Rule 23, Green v. Wolf Corporation, 406 F. 2d 291, 299 (2d Cir. 1968), and that considerable freedom must be allowed the trial judge who is saddled with the burdensome task of managing the class action. The decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion, having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." 48 F. R. D. at 131.

The decision of the Second Circuit has now established the inflexible rule that allocation is not permissible and

that a hearing to determine the propriety of allocation is not authorized by Rule 23.

Neither the defendants nor the panel questioned the right of the District Court to hold an evidentiary hearing to establish the ability to identify individual class members. Indeed, in its prior decision, the Court of Appeals directed the district court to hold an "evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (28a). Since Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances . . ." it is anomalous to hold that a hearing is proper on one aspect, i.e., what is the best notice practicable, but not on another, i.e., on whom the burden of the court's direction should fall.

Defendants were given a hearing on the cost of notice, with full opportunity to present evidence. Due process requires only the right to be heard. *Fuentes v. Shevin*, 407 U. S. 67 (1972). At such a hearing, the plaintiff need only establish the probable validity of his claim. Id. at 97; *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 343 (1969). Moreover, due process ". . . tolerates variances in the form of a hearing, 'appropriate to the nature of the case', *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 313 . . ." *Fuentes v. Shevin, supra*, 407 U. S. at 82.

CONCLUSION.

For the reasons stated above, this Honorable Court should grant the petition for a writ of certiorari to review the issues raised therein on the merits. Alternatively the Court should grant the petition, in order to remand the case for consideration by the Court of Appeals in banc.[8]

Respectfully submitted,

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8. *United States ex rel. Robinson v. Johnson,* 316 U. S. 649 (1942).

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Opinion of United States Court of Appeals for the Second Circuit Dated December 19, 1966 (Waterman, Moore and Kaufman, Circuit Judges) Denying Defendants' Motion to Dismiss Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1966

(Argued December 12, 1966 Decided December 19, 1966)

Docket No. 30934

[SAME TITLE]

KAUFMAN, Circuit Judge:

The sole question presented by this motion is whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims.

Morton Eisen brought an action in the district court alleging that two major "odd-lot" dealers on the New York Stock Exchange—Carlisle & Jacquelin and DeCoppet & Doremus—had conspired and combined to monopolize odd-lot trading, and had charged excessive fees, in violation of the Sherman Act. 15 U.S.C. §§1, 2. Specifically, he challenged the so-called "odd-lot differentials" charged by the appellee and other odd-lot dealers for transactions involving other than 100 share lots of securities. The complaint also charged the New York Stock Exchange with having breached its duties, allegedly proscribed by the Securities

Exchange Act of 1934, concerning suspension of odd-lot trading. 15 U.S.C. §§78f(b), 78f(d), 78s(a).

Eisen sued both for himself and on behalf of all odd-lot purchasers and sellers on the Exchange. Appellees moved to dismiss the class action, alleging that it was not maintainable under amended Rule 23(c)(1) of the Federal Rules of Civil Procedure. Judge Tyler granted the motion and dismissed the class action, but did not dismiss Eisen's individual claims or pass on their merits.

It is too clear for discussion that all orders are not appealable. 28 U.S.C. §1291 provides that the courts of appeals have jurisdiction of appeals from all "final" decisions of the district courts, while 28 U.S.C. §1292 permits appeals from a narrowly limited class of interlocutory orders. But as the Supreme Court has commented, "[A] decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964). The question presented to us, therefore, is whether Judge Tyler's order dismissing the class action falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

In making this determination, Justice Douglas' language in the *Gillespie* case is instructive:

> [I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality be given a *"practical rather than a technical construction."* • • •

> [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-53 (emphasis supplied).

In the present case, these considerations, rather than being "competitive," lead to a single conclusion—that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order "if unreviewed, will put an end to the action." Chabot v. National Securities and Research Corp., 290 F. 2d 657, 659 (2d Cir. 1961). We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. See Escott v. Barchris Constr. Corp., 340 F. 2d 731, 733 (2d Cir.), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U.S. 816 (1965). If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

There are, therefore, most compelling reasons to deny this motion to dismiss the appeal; and permitting Eisen to proceed in no way conflicts with any precedents of this Court. Appellees rely on Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2d Cir. 1944), but that decision was reached before the Supreme Court spoke in *Cohen, supra.* While it is true that in Lipsett v. United States, 359 F. 2d 956 (2d Cir. 1966), we did not permit an appeal from the dismissal of a class action, we reached that conclusion because the facts did not come within the framework of the *Cohen* doctrine; the plaintiffs lacked standing, and dismissal of the class action allegations, we said, merely "prettified" the pleadings since the action could still continue.

Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will, for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. See Roberts v. U.S. District Court, 339 U.S. 844 (1950); *Chabot* v. *National Securities and Research Corp., supra.*

Motion denied.

Opinion of United States Court of Appeals for the Second Circuit Dated March 8, 1968 (Medina and Hays, Circuit Judges) Reversing, Remanding and Retaining Jurisdiction, and Dissenting Opinion of Chief Judge Lumbard

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78—September Term, 1967.

(Argued November 6, 1967 Decided March 8, 1968.)

Docket No. 30934

[SAME TITLE]

MEDINA, Circuit Judge:

On this appeal we are presented with significant questions involving the interpretation of recently amended Rule 23 of the Federal Rules of Civil Procedure. Morton Eisen instituted this action seeking damages and injunctive relief on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange against Carlisle & Jacquelin and DeCoppet & Doremus, alleging that the two brokerage firms had combined and conspired to monopolize odd-lot trading, and had fixed the odd-lot differential at an excessive amount in violation of the Sherman Act. 15 U.S.C. Sections 1, 2. A third count alleged that the defendant New York Stock Exchange had failed to discharge its duties under the Securities Exchange Act of 1934 by neglecting to adopt rules protecting investors in odd-lots. 15 U.S.C. Sections 78f(b), 78f(d), 78s(a).

Following a motion by defendants for a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, Judge Tyler held that the suit could not be

brought as a class action. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966). A motion to dismiss the present appeal because the decision below constituted a non-final order has previously been denied by this Court. *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967). In dismissing the class action the District Court found that plaintiff failed to demonstrate that he would be able fairly and adequately to protect the interests of the class, Fed. R. Civ. P. 23(a)(4); that the notice required by due process and the rule, Fed. R. Civ. P. 23(c)(2), could not be given and that questions common to the class did not predominate over questions affecting individual members. Fed. R. Civ. P. 23(b)(3).

At the outset, it is necessary briefly to describe the mechanics of odd-lot trading on the New York Stock Exchange. The regular unit of trading on the Exchange is the "round lot" of 100 shares. An "odd-lot" is the term used to designate transactions involving less than 100 shares. Odd-lot orders do not form part of the "regular auction market" but are exclusively handled by special odd-lot dealers who buy and sell for their own account as principals. In order to purchase or sell an odd-lot an individual first contacts a brokerage firm which then places an order with the odd-lot dealer. The cost to the customer includes both a standard commission payable to the brokerage firm and the odd-lot differential which is received by the odd-lot dealer. The differential is a figure amounting to a fraction of a point for each share traded, which is added to the customer's purchase price and deducted from the sale price. During the period of time in which plaintiff had alleged he was involved in the odd-lot market, covering the years 1960-1966, the differential was ⅛th of a point (12½ cents) per share on stock selling below $40 per share and ¼ of a point (25 cents) per share on stock selling at $40 or above per

share.[1] Over the years odd-lot trading has accounted for a fairly steady percentage of the total volume on the Stock Exchange, ranging from a high of 12.9% in 1937 to a low of 7.9% in 1950 and 1958. For example, recent figures indicate that in 1961 the volume of odd-lot transactions totaled 214,018,834 shares. SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, Pt. 2, 88th Cong. 1st Sess. 171-202, 393 (1963), hereinafter cited as SEC Special Study. Defendants Carlisle & Jacquelin and De-Coppet & Doremus are engaged exclusively in odd-lots and collectively they handled 99% of the volume in odd-lot transactions. SEC Special Study at 172. Various alleged abuses in odd-lot trading disclosed by the SEC in 1963, form, in large part, the basis of the present action. See SEC Special Study at 171-202.

I.

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives. Class actions were divided into various categories reflecting the "jural relationships of the members of the class." See 3 Moore, Federal Practice par. 23.08 at 3434 (2d ed. 1953). Only after a determination of the nature of the rights: "joint, common or secondary" in the true class action, "several related to specific property" in the

1. The above figures do not reflect the change made in the differential which was effective as of July 1, 1966. Subsequent to that time the so-called "breakpoint" was raised to $55, with the differential amounting to ⅛th of a point on stock sold below that figure and ¼ of a point on stock sold above it.

hybrid class action, and "several affected by a common question and related to common relief" in the spurious class action, was a court able to proceed. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965), hereinafter cited as Advisory Committee's Note. There were significant differences in the *res judicata* effects accorded to the various class actions. Thus while a judgment in a true class action was binding on the entire class, the spurious class action only concluded the rights of parties. 3 Moore, Federal Practice par. 23.11 at 3472 (2d ed. 1953). Since the great majority of cases fell into this latter category, the objective of determining all questions in one suit was effectively frustrated. In essence, the spurious class action was interpreted as merely a permissive joinder device.[2] See *Carroll* v. *American Federation of Musicians*, 372 F. 2d 155 (2d Cir. 1967); *Fox* v. *Glickman Corp.*, 355 F. 2d 161 (2d Cir. 1965), *cert. denied* 384 U.S. 960 (1966); *Nagler* v. *Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957); *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). But see *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941) (dictum).

To avoid the problems associated with the original rule the Advisory Committee on the Rules of Civil Procedure has completely redrafted Rule 23 in order to provide a thoroughly flexible remedy. Throughout the course of a proceeding courts are given complete control to give assurance that the procedures adopted are fair, reasonable and effective. All actions will result in judgments binding on the entire group of individuals found by the court to be members of the class. Fed. Rule C. P. 23(c)(3). While the new concepts incorporated in the rule have not as yet been

2. There was a serious split in court decisions on the subject of the permissibility of "one-way intervention." Under this procedure, absent class members in a spurious action were permitted to intervene after a favorable judgment, while at the same time they were not bound by an unfavorable decision. Advisory Committee's Note at 105.

passed upon by any federal Court of Appeals,[3] they have received somewhat less than an enthusiastic reception in the District Courts. Compare *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967), expressing grave doubts about the propriety of a rule which binds absent but described class members, with *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) which upholds a class action brought by 5 franchise dealers on behalf of a class of over 700 dealers, alleging anti-trust violations. Nevertheless, the majority of courts have upheld the validity of representative actions brought under the new rule. See, e.g., *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966); *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967). But see *Richland* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Hohmann* v. *Packard Instrument Co.*, 43 F.R.D. 192 (N.D. Ill. 1967); *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Berger* v. *Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966). Although representing a totally different approach to class actions, the new rule does retain two standards which were embodied in the old rule, namely, the class must be so numerous as to make it impracticable to bring every member before the court, and the representative party must be able fairly and adequately to protect the interests of the entire class. Necessarily the old case law will furnish some guidance in defining these concepts.

3. The Fifth Circuit has on two occasions been presented with issues under the new rule. However, each of these cases involved aspects of class actions which are similarly handled under both the original and the amended rule 23. In one case the 5th Circuit held that claims could not be aggregated under the new rule to meet the jurisdictional amount in a suit which formerly would have been classified as a spurious action. *Alvarez* v. *Pan American Life Ins. Co.*, 375 F. 2d 992 (5th Cir. 1967). The other case involved a routine denial of a class action because the representative and the class members had conflicting interests in the subject matter of the suit. *Anderson* v. *Moorer*, 372 F. 2d 747 (5th Cir. 1967).

Opinion of United States Court of Appeals

II.

To be maintainable as a class action a suit must meet all the requirements set forth in Section 23(a)[4] and also fall within one of the subsections of 23(b).[5]

4. "Rule 23. *Class Actions*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

5. "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatable standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Plaintiff has alleged that he was engaged in odd-lot trading during the years 1960-1966. Though estimates of the number of class members similarly engaged in this activity during those years have varied, all the litigants concede "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants' "rough" approximation, not disputed by plaintiff, would place 3,750,000 individual and corporate buyers and sellers of odd-lots in the class. Similarly, the allegation that a conspiracy, whose object was to charge excessive rates on odd-lot transactions existed between the two brokerage firms, satisfies the requirement that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Furthermore, plaintiff's claim is "typical of the claims * * * of the class." Fed. R. Civ. P. 23(a)(3). Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers. However, defendants have argued that different members of the class will have varying theories as to what constitutes the "excessive price," and other class members may be satisfied with the present price policy.[6] Nonetheless, all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive.

6. For example, defendants maintain that a purchaser of an odd-lot at a cost below the "breakpoint" figure might urge that the differential be revised for the benefit of his class (stock selling at $40 or above) at the expense of the other class (stock selling below $40). However, plaintiff, as demonstrated by his answers to interrogatories, has purchased stock at prices both above and below the prevailing breakpoint. It seems farfetched to argue that plaintiff will adopt a position detrimental to his own interest. If plaintiff does pursue a self-defeating course of conduct, the class action may then be dismissed on the ground that he has failed adequately to represent the entire class. The court is also empowered to divide the present class into appropriate sub-classes. Fed. R. Civ. P. 23(c)(4).

Inability on the part of the plaintiff to "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), was considered by the District Court to be one of the primary reasons for dismissing the class action. We believe the court employed incorrect standards in reaching this result.

Since Eisen had not alleged with specificity the nature of his various odd-lot transactions, the court below felt it lacked sufficient information properly to assess his qualifications as a representative, and, even if such information were alleged, "the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966). The District Judge also felt it was impossible to assume that plaintiff "alone with a comparatively minuscule and limited interest in odd-lot transactions" could represent a class numbering at least in the hundreds of thousands, which encompassed individuals with much larger and different interests. *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966).

Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940). Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. See *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, a court must now carefully scrutinize the adequacy of representation in all class actions.

What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an

essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. See *Hansberry* v. *Lee*, 311 U. S. 32 (1940). Courts, on occasion, have also required that the interest of the representative party be co-extensive with the interest of the entire class, but this amounts to little more than an alternative way of stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. See *Richland* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967). However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited, see, e.g., *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), *cert. denied* 311 U. S. 700 (1940), but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed. As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966). Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. See *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). But to dismiss a

class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966), and that the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

We are not persuaded that it is essential that any other members of the class seek to intervene. Absent class members will be able to share in the recovery resulting in the event of a favorable judgment, and, if they wish to avoid the binding effect of an adverse judgment they may in various ways and at various times that we need not now attempt to particularize, attack the adequacy of representation in the initial action or disassociate themselves from the case. *Hansberry* v. *Lee*, 311 U. S. 32 (1940); see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 436 (1960). If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.

Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, see *Hess* v. *Anderson, Clayton & Co.*, 20 F. R. D. 466 (S. D. Cal. 1957), but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class

considers his representation adequate. Nor can silence be taken as a sign of disapproval.[7]

It is also worthy of note that the rule contains provisions which, by themselves, are designed to insure proper representation. For example, 23(e) requires court approval of a settlement, thus minimizing the danger that the rights of the class will be unfairly compromised. Accordingly, we decide that the District Court should reconsider the adequateness of plaintiff's representation in the light of the standards which we have set forth in this opinion.[8]

III.

In addition to complying with the requirements of Section (a) of Rule 23, a potential class action must also satisfy the requirements of one of the three subsections of 23(b).[9] Plaintiff has argued that the present action is maintainable under all three subsections of 23(b). However, we believe both 23(b)(1)(A)[10] and 23(b)(2) are not applicable to the present factual situation. Subsection

7. At various points in its commentary the Advisory Committee has referred to an article written by former Professor (now Judge) Jack B. Weinstein. In speaking of the adequacy of representation question Weinstein has said: "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights. * * * The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 460 (1960).

8. Inadvertently the court below did not notice that plaintiff, in answer to interrogatories, specifically listed his transactions in odd-lots. His damages were estimated at $70.

9. See footnote 5, *supra*.

10. Plaintiff does not now claim that 23(b)(1)(B) is applicable.

(b)(1)(A) authorizes a class action if "the prosecution of separate actions by or against individual members would create a risk of * * * inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Plaintiff has effectively rebutted his own argument because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation. Under these circumstances there is little danger that individual suits will establish "incompatible standards of conduct" for the defendants. Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory. Advisory Committee's Note at 102.

We must also note that plaintiff's effort to qualify the action under 23(b)(1) and 23(b)(2) was induced by his erroneous theory that notice is not "mandatory" under these sections. This theory is based on the assumption that 23(c)(2)[11] provides the only "mandatory" notice required by the new rule. Since this particular section refers exclusively to actions brought under 23(b)(3), other suits cognizable under either 23(b)(1) or 23(b)(2) would only

11. Rule 23(c)(2):

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

be subject to "discretionary" notice under 23(d)(2).[12] Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Advisory Committee's Note at 107.

Ultimately plaintiff must fall back on subsection (b)(3), which in effect corresponds to the old spurious class action. Presumably influenced by the same thinking which relegated the old spurious class action to the position where it was used primarily as a device for permissive joinder, the Advisory Committee has commented that "class action treatment is not as clearly called for [in (b)(3) situations] but it may nevertheless be convenient and desirable depending upon the particular facts." Advisory Committee's Note at 102. A court, under this subsection, is thus required to find that the questions of law or fact common to the class predominate over questions affecting individual members and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Moreover, resolution of the issue concerning the propriety of a suit under 23(b)(3) involves an assessment of various factors, including among others, "(A) the interest of members of the class in individually controlling the prosecution or defense

12. Rule 23(d):

"(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *."

of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "(D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

The District Court felt "the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation" and the "varied nature and quantum of the interests of other odd-lot purchasers and sellers" necessarily compelled a finding that questions affecting individual members predominated over questions common to the entire class. *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

However, under both the old and the amended rule 23, anti-trust violations practised upon large groups of individuals have been held to involve sufficient common questions of law or fact to merit treatment as class actions. *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir.), *cert. denied* 344 U.S. 820 (1952) (old rule); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965) (old rule); *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) (new rule); but see *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) (new rule). The Advisory Committee has specifically noted that "concerted anti-trust violations may involve" predominantly common questions. Advisory Committee's Note at 103. Suits alleging violations of Section 10(b) of the Securities Exchange Act, though often involving separate consideration of the elements of misrepresentation and reliance as they affect individual members, have also been accorded treatment as class actions under the new rule. *Fischer* v. *Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Gov-*

ernor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); but see *Berger* v. *Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966).

We realize that members of the proposed class might have had different motives when they entered into the odd-lot market.[13] We are also mindful of the fact that there may be a wide variety of orders some of which may require special handling by the odd-lot dealer.[14] Nevertheless, the alleged underlying conspiracy does contain a so-called "common nucleus of operative facts." *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). All of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action. *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E. D. Pa. 1965). Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages. Fed. R. Civ. P. 23(c)(4); Advisory Committee's Note at 106. Even if individual questions arise during the course of litigation, which render the action "unmanageable," the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself. Fed. R. Civ. P. 23(c)(1). Therefore, at this early stage of the proceedings, we find there has been an adequate demonstra-

13. For example defendants have referred to the different motives present in the following class members: investors, traders, speculators and arbitrageurs.

14. Defendants have listed 20 different types of orders including, among others, varying forms of limit orders, contingent orders and market orders.

tion that common questions of law or fact predominate over individual questions. See *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966).

Before allowing a suit to proceed under 23(b)(3) the trial court must also find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Although defendants argue that intervention and permissive joinder[15] are both superior to a class action, implicit in Judge Kaufman's prior opinion above referred to, denying defendants' motion to dismiss the appeal for lack of jurisdiction, is the assumption that the only feasible way to litigate these claims is by a class action.[16] The odd-lot differential payable on any one transaction under the rate schedule in effect at the time the complaint was filed ranged from 12½ cents to $24.75.[17] Plaintiff engaged in 47 odd-lot transactions between 1960 and 1966 paying a total of $259 in odd-lot differentials. Recognizing the nature of the odd-lot differential and the type of investors who often engage in these transactions, we think it highly unlikely that any one potential plaintiff would have

15. In one of the first articles criticizing old Rule 23 joinder was described as a situation which "presupposes the prospective plaintiffs advancing en masse on the courts." Surely that is not the case in the instant action. Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941).

16. "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, * * * it will for all practical purposes terminate the litigation." *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119, 121 (2d Cir. 1966), *cert. denied* 386 U. S. 1035 (1967). Judge Kaufman had assumed that $70 would be a reasonable estimate of plaintiff's damages. "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." *Eisen* v. *Carlisle & Jacquelin*, *supra* at 120.

17. Thus the minimum figure would apply where the transaction involves one share of stock selling for a price under $40. The maximum figure would apply where the transaction involved 99 shares selling for a price of $40 or above.

sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim.[18] Thus the present case appears to fall within that class of cases in which "the interests of individuals in conducting separate lawsuits" are more "theoretic than practical" since "the amounts at stake for individuals (are) * * * so small that separate suits would be impracticable." Advisory Committee's Note at 104. This belief is reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit. In any event, we are bound by Judge Kaufman's ruling as the law of this case.

Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations,[19] we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them. Concededly, the damages for individual class members will be small and the possibility remains that the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sustained. On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago

18. The possibility, as suggested by defendants, that a court may grant attorney's fees in excess of the damages awarded does not provide a meaningful alternate. It is unlikely that a plaintiff with a small claim will undertake complex anti-trust litigation on the remote possibility that a court may award anything like compensatory attorney's fees.

19. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chicago L. Rev. 684 (1941); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251, 295-98 (1966).

L. Rev. 684, 686 (1941).[20] Moreover, in the present case there is apparently no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system. See Comment, Recovery of Damages in Class Actions, 32 Univ. of Chicago L. Rev. 768, 785 (1965).

Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action. Defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of Special Masters, printing, postage and so on. Procedures should be outlined with regard to possible intervention by other class members and provisions made for the filing of claims. The court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue. There may conceivably be questions of jurisdiction or venue, as well as of demands for a jury trial.

In view of the arguments previously discussed relating to the necessity for separate computation of damages because of the variety of services performed by the defendant-dealers, it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action.[21] However, we do not

20. Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about $17,000,000. Over 85% of the claims were for less than $25 and refunds were made to more than a million people. See *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), *cert. denied* 307 U. S. 648 (1939).

21. As previously discussed, it would also be possible to order separate consideration of the question of damages.

express any opinion on this subject and we simply note that other courts in similar cases have been able to set up formulas of procedure for recovery that are applicable to an entire class. See, e.g., *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *petition for cert. dismissed* 371 U. S. 801 (1962). The court may also find that it is too early in the proceedings adequately to determine potential damage questions and hence that a decision on the propriety of a class action may have to be postponed.

IV.

The notice requirement of 23(c)(2), as recognized by Judge Tyler, presents what may turn out to be the most serious obstacle to the maintenance of the present action. Subsection 23(c)(2) provides:

> "In any class action maintained under (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel."

The District Judge held that "both the Rule and concepts of due process require individual notice for the class members who can be identified." *Eisen* v. *Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966). As a result of "practical financial limitations" present in the instant case, he was of the opinion that the notice requirement could not be met. Publication plus the mailing of individual no-

tice to stock exchange member firms was rejected as a possible alternative method.

While the Supreme Court has recognized that class actions represent an exception to the general rule under which only parties are bound by a judgment, the procedure adopted must conform to the requirements of due process and fairly insure the protection of absent parties who are to be bound. *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940). Notice, as an integral part of due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(d)(2)[22] were intended to fulfill the requirements of due process established in *Hansberry* and *Mullane*. Advisory Committee's Note at 107. The Advisory Committee also sought to ensure that individual interests would be respected in (b)(3) cases by giving class members the opportunity to avoid being bound by the judgment if they requested exclusion and so informed the court.

The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff.[23] Appellant has argued that mail notice to the entire class would cost approximately $400,000, and, therefore, must be deemed impracticable within the

22. See footnote 12, *supra*.

23. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 398 (1967); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251 at 300. We fail to see any support for the position adopted in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967) that the court itself has the burden of sending out the proper notice.

context of 23(c)(2). Consequently, a decision requiring such notice would effectively foreclose all opportunity to secure relief. Plaintiff contends that publication is "the best notice practicable under the circumstances." On the other hand, defendants suggest that cost considerations should not prevent many class members from receiving the individual notice they are entitled to both by the requirements of due process and by the terms of 23(c)(2), since their identities are "very easily ascertainable." *Schroeder* v. *City of New York*, 371 U. S. 208 (1962).

The District Courts have been inconsistent in their interpretations of the notice requirement under the new rule. One opinion reads 23(c)(2) as requiring that actual notice be given to all absent class members, *Richland* v. *Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967), while another has permitted a representative to use notice by publication to inform an entire class in a taxpayer's suit. *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N. D. Ill. 1967). See also *Harris* v. *Jones*, 41 F. R. D. 70 (D. C. Utah 1966), requiring individual notice to be given to 1500 class members in an action for violation of Rule 10b-5 of the Securities Exchange Act because all the names and addresses were on file and available.

On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom the action is stated to be commenced and maintained. But we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice. Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c)(2); there was also a lack of evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2) to which reference has already been made.

Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate, what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?

The affidavits before us are conclusory in character and they merely scratch the surface. For example, a general partner in Carlisle & Jacquelin in his affidavit states that there is no way in which his firm could identify the odd-lot customers.[24] Similarly, a general partner in a large member firm on the New York Stock Exchange declares that there is no ready way to separate odd-lot customers from round lot customers and that to determine which customers had odd-lot transactions in recent years would require sorting of approximately 300,000 to 400,000 names of customers.[25] Finally a general partner in another large member firm expresses his belief that there is no way of obtaining exact information about odd-lot transactions without analyzing the history of each account, a task which would be "virtually impossible."[26] Nevertheless, both on argument and as part of their briefs, defendants have argued that "many (odd-lot customers) can, in fact be identified through the appellee firms and the brokerage houses."

On remand the court may find that the names of certain class members, because of their widespread dealings in odd-lots, may be readily ascertainable. Arguably these class members may possess enough of a stake in the proceedings

24. Affidavit of Sander Landfield, general partner of Carlisle & Jacquelin, offered in support of motion to dismiss class action.

25. Affidavit of Dean Witter, Jr., general partner in Dean Witter & Co., offered in support of motion to dismiss class action.

26. Affidavit of Edwin B. Peterson, general partner in Francis I. du Pont & Co., offered in support of motion to dismiss class action.

to justify personal intervention. At this point the court will then have to consider once again the question of publication. Under certain circumstances published notice may amount to the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant. Similarly, in other cases publication has been rejected as insufficient notice where it was sought to be used by the City of New York, *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), the New Haven Railroad, *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) and the City of Hutchinson, Kansas, *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956). Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

It may be that in some situations it is better at the outset to decide that the proceeding may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the efficiency of the representation or the notice to be given, or the feasibility of meeting problems of judicial administration. In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted.

Finally, it is worthy of note that in dismissing the action as one including "a myriad of complex, frustrating, need-

less problems in attempted management" the District Court in *School Dist. of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1006, commented that, prior to the dismissal there had been "numerous hearings and conferences."

Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.

LUMBARD, *Chief Judge* (dissenting):

It seems to me that we should affirm Judge Tyler's ruling that this is not a proper class action because it is so clearly right on two counts: the impossibility of the plaintiff giving suitable notice and the unmanageability of this suit as a class action. I would not remand to the district court to do the obvious and the unnecessary.

What could be less of a class action than a suit where there are more than 3,750,000 potential plaintiffs living in every state of the union and in almost every foreign country? If this is a "class," it is so large and indiscriminate that a substantial proportion of its membership will have no idea whatever that they belong to it. Just how a notice can be worded which could alert so large a "class" to the possibility that proceedings in the Southern District, if carried forward, would someday enrich each one by a few dollars, if there be anything left after expenses and attorneys' fees, is a mystery to me.

Indeed, the question of how to give any notice which would be sufficient to meet constitutional requirements is so impossible of solution that my colleagues choose to ignore it.

If the plaintiff, who has participated in some 247 [corrected by Lumbard on 3/13/68] transactions over a period of years, estimates his damages at only $70, is it not evident that the overwhelming majority of all possible plaintiffs would expect at best to receive considerably less than $70? And what is sufficiently interesting about the expectation of such a recovery, available if at all, only after several years of litigation, to lead us to suppose that any considerable number would bother to respond to the notice. Despite articles in the May 3, 1966 edition of the New York Times and the May 4, 1966 edition of the Wall Street Journal no one has joined Eisen in this action. See *Berger* v. *Purolator Products*, 41 FRD 542, 544 (SDNY 1966). Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.

In any event, plaintiff suggests no way in which he can give notice to his 3,750,000 potential brothers-in-litigation which could conceivably attract the attention of any appreciable number of them. Who is to advise foreign class members who do not read or understand English, and how is this to be done? Who is to pay for class notice, and for the subsequent notice of any step in the action which the Rule says must be given?

To me, these illustrations of the practical and insurmountable difficulties that would be encountered in administering this action as a class suit underscore that Judge Tyler could only have exercised his discretion as he did. As a class action the claim is totally unmanageable. See *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 11 FR Serv. 2d 23.b.3, Case 1, 23.b.3-3 (E.D. Pa. April 24, 1967).

Even if all of the difficulties inherent in the administration of the suit were overcome, the amount expended in filing and processing claims would probably exceed any recovery. *Illinois Bell Telephone* v. *Slattery*, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U.S. 648 (1939) is inapposite.

In that case the telephone company had sought an interlocutory injunction against an Illinois Commerce Commission order requiring reduction of certain of its rates. The interlocutory injunction was granted, conditioned upon an undertaking by the telephone company to refund to its subscribers any sums paid by them in excess of the proposed reduced rates should the company lose its suit. The company had already collected the money and had laid it aside. The Supreme Court eventually ordered the injunction dissolved and that refunds be made in accordance with the terms of the injunction. *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U.S. 151 (1934). The telephone company agreed to undertake the task of making refunds and to assume the costs of the distribution. The payments were not made by the Court, but by the company under the supervision of a representative of the court. 102 F. 2d at 61.

In this case, unlike *Slattery,* the potential claimants have no direct business dealings with the parties which plaintiff seeks to hold liable, and therefore defendants are in no position to identify from their own records the potential claimants, let alone calculate the amounts of any refund that they may be found entitled to receive.

Here no one can ascertain whether any recovery will be due any particular plaintiff until the case has been litigated, and, if any recovery is decreed, there must follow an enormous number of calculations regarding the dealings of each plaintiff who is entitled to any recovery. And even after that the court would have to pass upon the expenses and fees to be deducted from any recovery.

Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they ever intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of $70. Rule 23(b)(3) requires that a class action

be superior to other available methods for the fair and efficient adjudication of the controversy, and requires that the court consider "the difficulties likely to be encountered in the management of a class action" in making its determination. See *Berley* v. *Dreyfus & Co.*, 11 FR Serv. 2d 23.b.3, Case 6 (SDNY Dec. 22, 1967). While this court has determined that dismissal of the class action "will for all practical purposes terminate the litigation," 370 F. 2d at 121, Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. As the Advisory Committee's Note suggests, "one or more actions agreed to by the parties as test or model actions may be preferred to a class action * * *" If plaintiff's case has any merit and his counsel are of excellent calibre, as he asserts, I see no insuperable barrier to organization by plaintiff, with the assistance of counsel, of a group of members of the purported class to sponsor this litigation as a test case with Mr. Eisen as the sole plaintiff. Even if a test case is not financially expedient from the viewpoint of plaintiff and his legal advisors, its obvious administrative advantages compel me to reject the unmanageable class action as an alternative. See *Richland* v. *Cheatham*, 11 FR Serv. 2d 23.a.52, Case 2, 23.a.52-12 (SDNY July 27, 1967).

Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.

The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.

Opinion of Tyler, J., Dated April 7, 1971 Providing That Action May Be Maintained as a Class Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Mordecai Rosenfeld, Esq., New York City, for Plaintiff.

Carter, Ledyard & Milburn, Esqs., New York City, for Defendant Carlisle & Jacquelin.

Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., New York City, for Defendant DeCoppet & Doremus.

Milbank, Tweed, Hadley & McCloy, Esqs., New York City, for Defendant New York Stock Exchange.

TYLER, District Judge:

Once again the case of *Eisen* v. *Carlisle & Jacquelin* has reached the point of determining whether it meets the requirements of a class action under Rule 23 of the Federal Rules of Civil Procedure. This is the latest in a series of opinions dealing with this complex issue, and it may not be the last. To recapitulate: *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966) initially determined that this case could not be maintained as a class action; *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) [hereinafter cited as *Eisen I*] held that the denial of the class action determination was appealable; *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) [hereinafter cited as *Eisen II*] reversed the initial denial of the class action and remanded to the district court for further findings necessary for the class action determination; *Eisen* v. *Carlisle & Jacquelin*, 50 F.R.D. 471 (S.D.N.Y. 1970) called for further information from the

parties as required by the Court of Appeals opinion in *Eisen II*. The nature of the case and of plaintiff's claims are adequately described in the prior opinions.

All parties have responded ably to the Court of Appeals and latest district court opinions, and it would appear that the court now has sufficient information to make all of the required findings for the class action determination.

First, the findings of fact relevant to the class action determination will be listed.[1] These findings were developed on remand and are based on submissions by the parties. Second, the conclusions required by Rule 23 will be made in light of these findings. Finally, the question of who shall pay for the cost of the Rule 23(c)(2) notice will be discussed.

FINDINGS OF FACT

1. During the period from May, 1962 through June, 1966, approximately 21,000,00 public individuals, institutions and intermediaries[2] (hereinafter collectively referred

1. The detailed findings of fact listed here should in no way be taken as an indication that this is a necessary procedure in every class action determination. See *Interpace Corp.* v. *City of Philadelphia*, 39 U.S.L.W. 2457 (3d Cir. Feb. 9, 1971). The approach has been dictated by the peculiar background and nature of this case.

2. The term "public individuals" means individuals who are neither members of the New York Stock Exchange nor partners nor stockholders in a member organization of the Exchange.

The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

The term "intermediaries" means non-members of the New York Stock Exchange through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies and non-member broker/dealers who place orders which are processed in an account or accounts in the name of the intermediary.

to as "shareholders") bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly held.

2. Approximately 6,000,000 shareholders had odd-lot transactions (transfers involving less than 100 shares) during the period from May, 1962 through June, 1966 in stocks listed on the New York Stock Exchange (hereinafter "NYSE"). Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5 percent a year, or a total of 600,000 persons.

3. During the period May, 1962 through June, 1966, the "average shareholder"[3] who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at $50.84 per share. The average odd-lot differential per transaction during such period was approximately $5.18.

4. During the period May, 1962 through June, 1968, the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at $51.07 per share. The average odd-lot differential during such period was approximately $5.04.

5. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June,

3. I.e., the typical buyer or seller of odd-lots.

1966 in stocks listed on the NYSE, the names and addresses of at least one-third, i.e. 2,000,000, can be identified as follows: fourteen of the largest brokerage firms[4] (hereinafter "wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jacquelin or DeCoppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56 percent of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated.

6. Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available, as well as the number of odd-lot transactions executed for each such account number.

7. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of

4. These fourteen firms are: Merrill Lynch, Pierce, Fenner & Smith, Inc.; Bache & Co. Inc.; Francis I. duPont & Co. Inc.; Loeb, Rhodes & Co.; Dean Witter & Co. Inc.; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Inc.; Shearson, Hammill & Co. Inc.; Paine, Webber, Jackson & Curtis; Hayden, Stone, Inc.; Reynolds & Co.; E. F. Hutton & Company Inc.; and Dominick & Dominick, Inc.

the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

8. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6 percent reside in foreign countries. The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table attached as Appendix A. From 1962 to 1965, New York and California had by far the largest numbers of such shareowners.

9. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000 or more public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through the "Monthly Investment Plan."[5] Such individuals can be identified through computer tapes in a way similar to that discussed above for approximately 2,000,000 shareholders.

10. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers described above, approximately 150,000 public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through "payroll deduction

5. The "Monthly Investment Plan" allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from $40 to $1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots.

plans",[6] all of which are operated by Merrill, Lynch, Pierce, Fenner & Smith, Inc. The names and addresses of such individuals can be identified through the records of Merrill, Lynch.

11. During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was $65,000. The approximate cost of the space for a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is $110,000. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was $400,000. The NYSE advertised in no other media.

12. There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

13. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally there are thousands of intermediaries who are located in virtually every country in the non-communist world.

6. A "payroll deduction plan" allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduction by the corporate employer from the salary or wages of the employee. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commissions and other expenses incurred in the purchase of shares. Normally, a payroll deduction for such purchases requires odd-lot rather than round-lot transactions.

14. Rule 409 of the NYSE provides in part as follows:

> (a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter. * * *
>
> (d) Customers' confirmations shall bear a notation or legend which will enable the customer to determine the amount of any odd-lot differential.

15. A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

16. *Cherner* v. *Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the court, that defendants would create a $5,300,000 fund to settle all claims. The court appointed a Special Master, two Assistant Special Masters (including a computer corporation engaged to process claims), a distribution agent and an agent to arrange for publication of notice.

The Special Master mailed approximately 150,000 applications (forms for proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 claims covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were

invalid, 1,177 were disapproved (143 of these after hearing) and 33,039 were approved.

The approximate expenses involved in administering the settlement fund were as follows: (a) counsel fees and expenses—$275,000; (b) Special Master—$54,000; (c) Assistant Special Master (attorney)—$79,000; (d) Assistant Special Master (computer corporation)—$688,000; (e) Distribution Agent—$12,000; (f) services related to publication (not including actual publication costs)—$9,000. The total expense was approximately $1,117,000.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged $25.47 per person excluding attorney's fees and $33.80 per person including attorney's fees.

17. The class action aspect of *State of West Virginia* v. *Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S.D.N.Y.) (hereinafter cited as the "*Drug Cases*") involved a recovery on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. It is estimated that the class includes approximately 150 million persons located in every state of the Union and Puerto Rico. Defendants in the *Drug Cases* agreed to settle all cases for a total of $100,000,000; $37,000,000 of that was allocated to the class of individual consumers. Defendants also agreed to advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved.

18. The total expense of maintaining and settling the *Drug Cases* consumer class action will be approximately $285,000. These expenses can be divided into the following three categories:

(a) *Rule 23(c)(2) Notice*—A notice informing class members of their right to file claims or opt-out of the class

was published in every English and Spanish language newspaper of general circulation published in the United States. The total cost was approximately $130,000. In response to this notice 42 individual consumers served notices opting out. During the months immediately subsequent to publication of this notice, plaintiffs' attorneys received several hundred telephone calls from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice, including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related expenses.

(b) *Rule 23(e) Notice*—A notice of hearing on the proposed settlement was published in the two newspapers of largest circulation in each state. The total cost of this publication was around $30,000. In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Approximate expenses for this notice were: $6,300 for the preparation of the consumer class mailing list and $7,100 for duplicating and mailing the notice. In addition, about $8,500 of general expenses (cost of post office boxes and the expense of an escrow agreement) have been allocated to the consumer class. The total expense to the consumer class was, therefore, $53,000, in round numbers.

(c) *Processing of Claims*—As of August, 1970, plaintiffs' attorneys had received $65,000 for processing consumer claims; the best estimate for the total expense for this item is $100,000. Approximately 42,000 individual claims, representing total drug purchases of approximately $17,000,000, have been filed. All claims have been processed by plaintiffs' attorneys using their own filing system, refund forms and forms for responding to claimants. No special master has yet been appointed or found necessary. Approximately one-half of the 42,000 claims received did not

contain sufficient information to be accepted and required follow-up correspondence seeking clarification.

Approximately 80 percent of the claims filed contained only approximate cost information for various reasons, viz.: claimant had no records of drugs purchased; druggist refused to supply the information; drug store had ceased doing business; doctor could not or would not supply the information. To check validity of claims, plaintiffs' attorneys are reviewing each claim where total purchases exceed $1,000 and spot checking all others. Three categories have been established after review: claims approved in full, claims approved in part and disapproved claims. Plaintiffs' attorneys are recommending to the court that all approved claims be paid a fixed percentage of their total drug purchases.

19. Costs of publication of various size notices in newspapers of several large cities are set forth in Appendix B.

20. The printing cost for 2,000,000 copies of plaintiff's proposed notice would be approximately $9,350. The printing cost for 2,000,000 verified claim forms as proposed by defendants would be approximately $9,400.

21. The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10 cents per letter, including the postage, irrespective of the number of letters to be sent.

RULE 23 CONCLUSIONS

I. *Prior Determinations*

The Court of Appeals heretofore has determined that certain requirements on the face of Rule 23 are satisfied in this action. To summarize, under Rule 23(a): (1) the

class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; and (3) the claims of plaintiff are typical of the claims of the class. *Eisen II* at 561-62. Rule 23(b)(1) and (2) are not applicable to this action. *Eisen II* at 564. Under Rule 23(b)(3), the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *Eisen II* at 566, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Eisen I* at 121.

II. *Questions to be Considered on Remand*

A. *Adequacy of Representation*

The first question left open by the Court of Appeals for consideration by this court was whether the plaintiff, as representative party, will fairly and adequately protect the interests of the class. F.R.Civ.P. Rule 23(a)(4). For making this decision, the Court of Appeals set out certain guidelines. First, this court is to determine whether the attorney for plaintiff is "qualified, experienced and generally able to conduct the proposed litigation." *Eisen II* at 562. Second, the court must be satisfied that there is little likelihood of a collusive suit or of plaintiff's having interests antagonistic to those of the remainder of the class. *Id.* Third, and generally, the court must be satisfied that plaintiff is interested enough to be a forceful advocate and that a substantial number of class members would accept him as their representative if they were given a choice. *Id.* at 563 n.7; Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buff. L. Rev. 433, 460 (1960).

I have no hesitation in ruling that plaintiff and his attorney meet all of these requirements. It has already been determined that plaintiff's claim is typical of the claims of the class, and from the nature and quality of the litiga-

tion conducted to date, there is little doubt that plaintiff's attorney is a qualified, forceful advocate who will adequately protect the interests of the entire class. The issues raised thus far have all been hotly disputed, to say the least, and I find no evidence before me that this is a collusive suit. Defendants have suggested that since plaintiff has proposed a "fluid class recovery" as a means of distributing some if not all of the damages to the class, somehow this indicates that he has interests which are antagonistic to the remainder of the class. But, for reasons which are discussed more fully below in connection with the issue of manageability, I reject this argument and find that plaintiff's proposal is a flexible and practical means of satisfying the interests of the entire class.

B. *Manageability*

The second and by far the most difficult question to be considered by this court is what has generally been called the issue of manageability. It derives from one of the factors to be considered under Rule 23(b)(3) in determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pursuant to subparagraph (D), the court must examine "the difficulties likely to be encountered in the management of a class action". Although this is merely one factor among many on the face of the Rule, in a case of the size and nature of this one, the issue of manageability assumes major proportions.

Before discussing specific details of the management of this class action, a definitive ruling should be made as to the exact composition of the class. Based on the allegations in the complaint and on the findings set forth above, the class in this case is composed of all public individuals, institutions and intermediaries who bought and/or sold odd-lots of shares of stock on the NYSE during the period from

May 1, 1962 through June 30, 1966. Such definition is, of course, subject to modification at a later time. Rule 23(d), F.R.Civ.P.

1. *Computation of Damages.* One of the primary concerns of this court in its most recent opinion was whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim. In approaching this question, it is recognized that an exact computation is not required; it is sufficient, of course, if there is relevant data from which the jury can make a just and reasonable estimate of the damages. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264 (1946); see also *Union Carbide and Carbon Corporation* v. *Nisley,* 300 F.2d 561, 590 (10th Cir. 1962), appeal dismissed, 371 U.S. 801 (1962). If a wrong has been done, courts generally can find a way of placing a value, albeit a rough one, on the amount of damages suffered.

In this case, I am satisfied that gross damages may be fairly estimated without having individual claims filed by each class member. The sources for such a computation will include at least the following: defendants' own records, the REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) [hereinafter cited as SEC Special Study], records of the NYSE Special Committee on Odd Lots relating to the lowering of the odd-lot differential in 1966 and a cost study of the odd-lot industry conducted for the NYSE by Price Waterhouse & Co. See *Daar* v. *Yellow Cab Company,* 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967); *contra, Hawaii* v. *Standard Oil Company of California,* Civ. No. 2826 (D. Hawaii, filed May 27, 1969).

Defendants consistently have stressed the number of variations in the types of odd-lot transactions, implying

that this would necessitate a separate calculation of damage for each individual transaction. Although originally influenced by this argument, see *Eisen* v. *Carlisle & Jacquelin*, 41 F.R.D. 147, 150 (S.D.N.Y. 1966), in light of the availability of such information and records discussed above, I now reject it. As the Court of Appeals has pointed out, moreover, defendants make the same charge to all buyers and sellers no matter what the type of transaction. *Eisen II* at 562.

2. *Mechanics of Administration.* Under this heading the Court of Appeals directed that certain specific questions be considered to insure that insuperable obstacles do not present themselves at a later time after much time and money are expended by both the parties and the court. In the discussion of these questions, it will be noted that most of the estimates involved are based primarily on the experience of this court in administering the settlement of the consumer class action phase of the *Drug Cases*. Defendants have argued, and at least two courts have indicated, that the experience in the *Drug Cases* is not a valid reference for cases where there is no settlement and all issues are disputed to the bitter end. See *Hackett* v. *General Host Corporation*, Civ. No. 70-364 (E.D. Pa., filed July 30, 1970); Record of May 19, 1970, at 41-42, *Union Health Center of New York* v. *Chas. Pfizer & Co. Inc.*, Civ. No. 69-2838 (S.D.N.Y.). There is something to be said for this position; thus, where obvious distinctions between this case and the *Drug Cases* have required, I have adjusted estimated expenses accordingly. On the other hand, it is obvious that the major burden and cost of administering this class action will occur, if at all, at the point where liability has been determined and damages awarded. If this case should ever reach that posture, the remaining task would be distribution of a specific fund and in this sense not very

different from the settlement posture and procedures of the *Drug Cases.*

As to the specific areas of determination suggested by the Court of Appeals, first, I find that a special master hopefully and probably will not be necessary in this case. Although a special master and two assistants were appointed in the *Cherner* case at substantial cost, see Finding Number 16, I note that this procedure was successfully avoided in the *Drug Cases* where the burdens have been assumed by plaintiffs' counsel. Although it is true that plaintiff's counsel here is a single practitioner, he may receive assistance from counsel for other class members, and if not, arrangements for administrative assistance should not be too difficult or costly—and less costly, it is to be assumed, than the fees and expenses of a master.

Second, an estimate of the sums required for paperwork, printing, postage and publication is required. These sums can be divided into three categories: (a) Rule 23(c)(2) Notice, (b) Rule 23(d) Notice if liabiilty and damages are determined and (c) processing of claims and inquiries.

(a) As discussed more fully below, the cost of notice required by due process and Rule 23(c)(2) in this case can be computed at approximately $21,720.

(b) If liability and damage should be determined, more extensive notice to invite filing of claims under Rule 23(d) might be possible since the expense of such notice could be deducted from the total amount of damages. Thus, estimates for mailing individual notices to the 2,000,000 identifiable class members here, see Finding Number 5, would be $9,350 for printing notices, $9,400 for printing proof of claim forms and $200,000 for stuffing and mailing. In addition, relying on the *Drug Cases,* published notice might be required in

the two newspapers of largest circulation in each state at a cost of approximately $30,000. Publication in several major foreign newspapers can be estimated at $23,000. See Finding Number 19 and Appendix B.

(c) Processing of the 42,000 individual claims filed in the *Drug Cases* is expected to reach a total cost of approximately $100,000. See Finding Number 18. However, since this figure may not reflect the cost of processing of inquiries after the Rule 23(c)(2) notice and because there is great likelihood that there may be a larger number of claims filed in the instant case, an estimate for processing of claims and inquiries should be double the *Drug Cases* figure, or approximately $200,000.

Thus, combining all three categories, at this point in the litigation the best estimate of the total sums required for paperwork, printing, postage and publication is $500,000 in round numbers.

The third mechanical question generally concerns procedures for possible intervention of other class members. See *Eisen II* at 567. As the class action device has come to be used more frequently, the experience in this court has indicated that intervention can be accomplished by very simple procedures. For example, class members so inclined might contact plaintiff's counsel and make an appropriate motion setting forth concise facts indicating that the would-be intervenors qualify as class members.[7]

7. Also, the appellate court suggested, *Eisen II* at 567, that consideration be given to possible problems of jurisdiction and venue. Upon remand, counsel have not suggested nor do there appear to exist significant jurisdictional problems, save perhaps those related to the substance of plaintiff's claims discussed hereinafter. Since defendants are located within this district, as is the bulk of relevant documentary evidence, venue seems proper here. Finally, no significance in relation to the class action determination issue attaches to the fact that plaintiff has already demanded a jury trial.

The fourth mechanical question concerns possible problems class members might have in filing and proving their claims. Filing, of course, can be routinely accomplished by filling out and mailing in a proof of claim form to be supplied by the court through plaintiff's counsel. Defendants have already proposed a form which appears acceptable, with some possible minor modifications. Claims can be proved either by verification or certification by the claimant's broker-dealer. An analogous method has proved satisfactory in the *Drug Cases*. See also *Union Carbide and Carbon Corporation* v. *Nisley, supra* at 587-88. Defendants have submitted affidavits of brokers stating that, because of routine destruction of records or practical impossibility, they would be unable to furnish customers with records of their odd-lot transactions in the relevant period. Accepting these affidavits as true, they do not establish that all such records are unavailable through broker-dealers; moreover, it cannot be assumed from these available affidavits that customers are without records of their own. Lost or missing records are normal hazards of litigation in general; this circumstance cannot be fairly raised as a bar to class litigation.

3. *Distribution of Recovery.* The Court of Appeals has made clear that one of the most important considerations in a case of this type is the likelihood that class members will share in any eventual judgment. In weighing the class action question, the trial court must balance the desirability of providing a forum for bona fide small claims against the impropriety of permitting suits which only benefit lawyers. *Eisen II* at 567. Crucial also is the ability of the court to fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits. See *In re Multidistrict Private Civil Treble Damage Anti-*

trust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 14 F.R. Serv.2d 420 (C.D. Cal. 1970); *Daar* v. *Yellow Cab Company, supra.* Cf. *Bigelow* v. *RKO Radio Pictures, supra* at 264.65.

Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly sterotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims. These transactions are also frequently repeated by many individuals who may be expected to repeat. See Finding Number 2.

With these indicia present, I think it appropriate, as plaintiff urges, to consider some kind of "fluid class recovery", i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts. Indeed, there is respectable precedent for such a "fluid class recovery". See *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963), cert. denied, 373 U.S. 913

(1963); the *Drug Cases, supra; Daar* v. *Yellow Cab Company, supra.* This does not mean, of course, that individual recovery is to be entirely ruled out. Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder.

It is not now necessary to determine the exact nature of fluid class recovery which might be used in this case. That is a matter for the court and the parties if and when liability is determined and damages assessed. It is necessary to recognize at this point, however, that a method of recovery of damages not claimed by individual class members can be fashioned to substantially benefit the entire class. In this regard, plaintiff has suggested that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted. See *Bebchick* v. *Public Utilities Commission, supra; Daar* v. *Yellow Cab Company, supra.* In this manner, the class members, assuming they have maintained their odd-lot activity, will reap the benefits of any recovery. Without intending to rule now on the nature of any possible recovery in this case, suffice it to say that plaintiff's suggestion has sufficient merit to at least satisfy the court that some method of distribution will be possible if required.

Defendants have argued that plaintiff, by advancing this proposal, has effectively abandoned the original class and thereby established his inadequacies as champion of that class. I am constrained to disagree, however, since the proposal is specifically designed to provide the best practicable method of benefiting the original class—i.e. to insure that the litigation, if successful for the class, does not founder upon shoals of excessive costs and detail in awarding and computing damages on an individual basis. In

addition, defendants have suggested that plaintiff's proposal would constitute "judicial rate-fixing", thereby infringing upon the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). This argument may have merit, but defendants press it too far—i.e. such a reduction in the differential, if carried out, might properly be done under SEC supervision or at least with SEC approval.

Having thus considered possible methods for distribution of a recovery, there remains only for consideration the "mathematical prospects" of the case in order to ascertain at least the theoretical availability of a fund from which to distribute damages. This simply means and requires a rough estimation of potential damages, deducting therefrom the estimated costs of administration to determine a net potential fund available for actual distribution. The costs of administration were estimated heretofore at $500,000. Estimating gross potential damages is necessarily more difficult, but a rough maximum and minimum might be arrived at as follows: (1) maximum—defendants' reduction of the odd-lot differential in 1966 amounted to approximately $5,000,000 per year—multiplied by the four years here in question and trebled, damages might be $60,000,000; (2) minimum—assuming a five percent illegal portion of the odd-lot differential during the relevant period[8] and applying it to the average number of transactions and the average differential during the relevant period, multiplied by 6,000,000 and trebled, damages might be approximately $22,000,000. Thus, it becomes apparent that if plaintiff succeeds on behalf of the class, there will be a substantial recovery to be distributed.

8. Plaintiff has estimated that he paid $259 in odd-lot differentials from 1960-1966 and that his damages were about $70. Thus, his claim is that approximately 27 percent of the charge was illegal. For purposes of establishing a minimum on potential damages, I have arbitrarily chosen 5 percent.

C. *Notice*

Determination of the kind of notice and how to disseminate it, as this case illustrates, can be a difficult task for the district court. Notice must be governed not only by basic due process standards but also by the standards of Rule 23 (c)(2) itself. Thus, an examination of these requirements will be necessary before determining the kind of notice appropriate in this case.

As stated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the fundamental requirement of due process in any final proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The test is a flexible one and must be applied on a case-by-case basis: "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15. Frequently a balancing of interests is required. *Id.* at 313-14. In addition, emphasis is to be placed upon the procedure adopted as a whole to insure that it results in full and fair consideration of all claims and adequately protects the interests of those persons not present but bound by the judgment. *Hansberry* v. *Lee*, 311 U.S. 32 (1940). See also *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra* at 319; *Dolgow* v. *Anderson*, 43 F.R.D. 472, 500 (E.D.N.Y. 1968); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kans. 1968); *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), aff'd., 408 F.2d 1171 (1969).

Rule 23(c)(2) does not add to these requirements; it simply formulates guidelines for a particular kind of notice in a particular kind of action. See *Eisen II* at 568; Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 107 (1965) [hereinafter cited as Ad-

visory Committee's Note]. The district court must direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." F.R.Civ.P. Rule 23(c)(2). As is clear from the face of the Rule, the notice should be designed to inform class members of the possibility of their excluding themselves from the action, the possibility of their appearing and participating in the action and the fact that they will be bound by any judgment if they do not exclude themselves. In light of these purposes, it naturally follows that as the size of potential recovery available to each class member diminishes, any incentive class members may have to respond to the notice also diminishes. See *Berland* v. *Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969). Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.

Although not so stated in the Rule, the notice effectively serves to protect defendants in two ways. First, by including in the judgment all members who do not affirmatively opt out, defendants can obtain significant *res judicata* benefits. Second, a large number of class members may opt out, not wishing to press their claims even though they may be legitimate. In the context of this case, it is significant that the applicable statute of limitations has run, 15 U.S.C. §15b (1964); hence *res judicata* consequences presumably matter little to defendants. But see *Philadelphia Electric Company* v. *Anaconda American Brass Company*, 43 F.R.D. 452, 461 (E.D. Pa. 1968).

Finally, in determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application there-

of as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation. See *Herbst* v. *Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); *Dolgow* v. *Anderson, supra* at 497. Cf. *Booth* v. *General Dynamics Corporation*, 264 F. Supp. 465 (D. Ill. 1967). Hence, the district court must strive to fashion notice which fairly and adequately protects all interests in the action without imposing what in effect amounts to an insurperable tariff on prosecution of the case.

1. *Form of Notice.* Applying these general principles to the case at hand, the Court of Appeals has indicated that there should be some "evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2)." *Eisen II* at 569. I believe that the findings of fact enumerated above should satisfy this requirement, and they are to be deemed incorporated in this discussion.

First, plaintiff has offered to send individual notice to all member firms of the NYSE and to all commercial banks with large trust departments, the assumption being that many class members may thus receive indirect but nevertheless effective notice. Although, by itself, this would be far from satisfactory, in combination with the other forms of notice discussed below, this proposal does increase the likelihood of reaching a significant portion of the class. The same is true for any news coverage which might be generated during the course of this suit. See *Snyder* v. *Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968); *Johnson* v. *Robinson*, 296 F. Supp. 1165 (N.D. Ill. 1967), aff'd, 394 U.S. 847 (1969).

Second, some form of mailed notice must be sent to individual class members who are reasonably identifiable. Defendants have taken the position that any mailed notice must go to all of the approximately 2,000,000 class members

who are identifiable. See Finding Number 5. Although the argument has some merit, I conclude that such notice is not compelled by the standards of due process and Rule 23(c)(2) in the context of this case. First, the flexibility of the rule is clear on its face, speaking in terms of the "best notice practicable under the circumstances" and of class members who are indentifiable "through reasonable effort."[9] In addition, even due process requirements have been phrased in terms of identifying persons whose names and addresses are "very easily ascertainable." *Schroeder* v. *City of New York*, 371 U.S. 208, 212-13 (1962).

Individual notice in this case shall be mailed to the approximately 2,000 or more class members who had ten or more transactions during the relevant period. See Finding Number 15.[10] This accords with the Court of Appeals' suggestion of trying to identify those class members who may have "enough of a stake in the proceedings to justify personal intervention." *Eisen II* at 569. In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random

9. See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 396 (1967):

> In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up.

10. The figure in Finding Number 15 is based on a representative sample of the tapes of four of the fourteen wire firms which have such tapes. I assume that a survey of the remaining tapes will turn up more than the approximately 2,000 identified so far.

from the 2,000,000 persons and firms who are identifiable.[11] The total cost would be approximately $1,000 for printing, stuffing and mailing.

Third, and finally, notice by publication shall be required as a feasible attempt to reach the remainder of the class. Such notice shall be one-quarter page in size and shall take place once each month for two consecutive months in the following publications: (1) national edition of the *Wall Street Journal* (approximately $5,000); (2) financial section of the *New York Times* (approximately $2,100); (3) financial sections of the *San Francisco Chronicle* and *San Francisco Examiner* (approximately $1,700); and (4) financial section of the *Los Angeles Times* (approximately $1,560). Obviously, these are somewhat arbitrary determinations intended to provide the most suitable notice under the circumstances, but there are significant reasons for choosing these publications. The *Wall Street Journal* has long served the overall community of investors, and the national edition should reach a large and disparate number of class members. Also, as of 1965, New York and California had by far the largest number of shareowners of public corporations in comparison to all other states; there is no reason to suppose their position has slipped in the intervening six years. See Finding Number 8 and Appendix A. Selection of the particular cities and newspapers is designed to reach the largest number of class members in those areas.

In the circumstances of this case, I reason that such notice devices together will fairly accommodate the interests of both the class and the defendants. Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the inter-

11. There is an additional reason for requiring this random notice—it is theoretically possible that the large claimants might form a special subclass either friendly toward defendants or not entirely representative of the small claimants.

ests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case. See *Eisen II* at 563.

2. *Contents of Notice.* Although it is not necessary to decide now the final content of the notice, plaintiff has made a proposal, attached as Appendix C, which is succinct and, with minor modifications, should be satisfactory. That proposal specifically includes a brief description of the proposed fluid class recovery, thus giving each class member an opportunity to express himself on this aspect of the suit. In order to gain more information about the nature of the class, the mailed notice to individual class members will also include a request for the following information: the number of odd-lot transactions during the 1962-1966 period, specifying for each the number and price of shares bought or sold, the name of the stock, the name of the brokerage firm and the amount of the odd-lot differential charge if known. Such a request will be for voluntary responses only and will not be treated as a requirement for inclusion as a member of the class. But see *State of Iowa* v. *Union Asphalt & Roadoils, Inc., supra* at 403-05; *Philadelphia Electric Company* v. *Anaconda American Brass Company, supra* at 462. Not only would such a mandatory procedure be contrary to the language of Rule 23(c)(2), but also it would be unnecessary in this case in light of the contemplated method of computing damages and the proposed fluid class recovery heretofore discussed.

3. *Administration of Notice.* Plaintiff shall be responsible for making all arrangements for printing, mailing and

publication, except that defendants shall supply him with all necessary names and addresses of individual class members. The individual notice will be sent on court stationery from the Clerk of the Court with a special post office box designated for all responses. Inquiries and responses will be managed by the plaintiff under court supervision.

III. Cost of Notice

The question of who shall pay for the Rule 23(c)(2) notice is the only serious obstacle remaining which might prevent the maintenance of this suit as a class action.[12] Plaintiff has asserted from the outset that he cannot pay for the forms and methods of notice ruled necessary in this case, and if I were to follow literally the earlier indication of the Court of Appeals that the plaintiff must always pay for the expense of notice in the first instance, *Eisen II* at 568, this litigation would come to an abrupt termination.

Thus, the doubts and difficulties of this class action become finally focused on this one issue. If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, *Eisen II* at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in defendants' passing on to their customers, including many of the class members in this case, the expenses of defending these actions.

12. The cost of any subsequent notice, for example under Rule 23(d) regarding the filing of claims, should not present the same problem since the issue of liability will have already been determined.

A. Considerations in Allocating Expenses of Notice

After reviewing all of the submissions and arguments of the parties to date, I conclude that I cannot now fairly decide the question of who shall bear the expense of the Rule 23(c)(2) notice. There are various considerations which lead to the conclusion that, in the context of this case, it may be appropriate to impose a share or a substantial portion of the notice expense on the defendants.

First, the issue of who shall bear these expenses has not been decided as one rule to be applied to all cases. Although some courts and commentators have assumed that plaintiff shall always pay the cost in the first instance,[13] some have also declined to make such an assumption and recognized the propriety of apportioning the burdens in certain cases.[14] Indeed, despite the apparently unequivocal language in *Eisen II, supra,* the Court of Appeals for this circuit has indicated in a subsequent opinion that the question is still an open one. *Green* v. *Wolf Corp.,* 406 F.2d 291, 301 n.15 (2d Cir. 1968). I think that the better view is that

13. See *Weiss* v. *Tenney Corp.,* 47 F.R.D. 283, 294 (S.D.N.Y. 1969); *Richland* v. *Cheatham,* 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Ward and Elliot, *The Contents and Mechanics of Rule 23 Notice,* 10 B.C. Ind. & Com. L. Rev. 557, 566-67 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, supra* at 398 n.157; Frankel, *Amended Rule 23 from a Judge's Point of View* in Symposium, "Amended Federal Rule 23: Antitrust Class Actions?" 32 A.B.A. Antitrust L.J. 251, 300 (1966). *Compare* Wright, Remarks to Judicial Conference of the Third Circuit, 42 F.R.D. 437, 565 (1966) *with* Wright, Class Actions, 47 F.R.D. 169, 180 (1969).

14. See *Bragalini* v. *Biblowitz,* CCH FED. SEC. LAW REP. ¶92,537 (S.D.N.Y. Dec. 16, 1969); *Herbst* v. *Able, supra; State of Minnesota* v. *United States Steel Corporation,* 44 F.R.D. 559, 577 (D. Minn. 1968); *Dolgow* v. *Anderson, supra* at 498-500; Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 Md. L. Rev. 139, 156 (1969); Note, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 Harv. L. Rev. 874, 938 (1958).

the decision on this question, whenever required because of plaintiff's inability to pay, is an appropriate area for the exercise of the court's discretion, "having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." *Berland* v. *Mack, supra* at 131. To the extent that this may result in the imposition of a burden on defendants prior to trial, analogy to the preliminary injunction remedy lends some support. A prime policy consideration underlying preliminary injunctive relief may be applicable here, viz., the need to create or preserve a state of affairs which will enable the court to render a meaningful decision. See Note, *Developments in the Law—Injunctions,* 78 Harv. L. Rev. 994, 1056 (1965).

Second, this court cannot overlook the serious nature of the antitrust claims in this suit when viewed against the strong public policy behind the antitrust laws in general, and the fundamental role of the private treble-damage action in enforcing those laws in particular. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 131 (1969); *United States* v. *Borden Company,* 347 U.S. 514, 518 (1954); *Monarch Life Insurance Company* v. *Loyal Protective Life Insurance Company,* 326 F.2d 841, 845 (2d Cir. 1963), cert. denied 376 U.S. 952 (1964). In a case such as this, even if the Securities and Exchange Commission were to bring its own action, it would be limited to seeking an injunction only, practically less than an adequate remedy since many of the alleged practices of defendants have been subsequently modified. The private class action is the only means of providing for repayment of any alleged illegal profits. See *Dolgow* v. *Anderson, supra* at 482-83.

Third, because the statute of limitations has now run in regard to the claims in this case, no one else will be able to

pursue the offenses alleged here, not even the government. See *Green* v. *Wolf Corp., supra* at 301 n.14. But see *Philadelphia Electric Company* v. *Anaconda American Brass Company, supra* at 461. In sum, plaintiff's action provides the only available means of reaching the merits of this controversy.

Fourth, after reviewing the purposes and structure of Rule 23, the Court of Appeals has specifically held that it is to be given a liberal rather than a restrictive interpretation. *Eisen II* at 563.

Fifth, the public interest in this case is at least theoretically great, not only because of the serious nature of the antitrust claims, but also because of the large number of persons affected by the allegedly illegal overcharge. The New York Stock Exchange and its member brokers owe very important duties to investors, see generally 15 U.S.C. §§78a *et seq.* (1964), and this suit directly raises questions concerning public confidence in the stock market and its fiduciary institutions. Cf. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 349-50, 359 (1963).

Sixth, a class action will provide important *res judicata* effects for defendants, although it is true that this consideration is of little importance here because the statute of limitations has run.

Seventh, and finally, although the court has by no means reached the substance of this case as yet, there are bases for presuming merit in plaintiff's claims. In view of the SEC Special Study, *supra,* and the NYSE cost study and subesequent reduction of the odd-lot differential by approximately $5,000,000 per year, this cannot presently be characterized as a frivolous suit. From this it follows that it would be unfair to tax plaintiff with the cost of paying for notice at this point.

B. Preliminary Hearing on Merits

Before considering how to apportion the costs of notice, if plaintiff cannot pay, the court itself must have a preliminary but reasonably thorough view of the merits of the case. See *Berland* v. *Mack, supra* at 132. Cf. *City of New York* v. *International Pipe and Ceramics Corporation*, 410 F.2d 295, 297 (2d Cir. 1969); *Green* v. *Wolf Corp., supra* at 294. Again, an analogy to the preliminary injunction is helpful: before imposing a burden on defendants prior to trial, plaintiff must make a strong showing of likelihood of success at trial on the merits. See *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). Such a procedure is allowed even though the court cannot be assured of plaintiff's final success, particularly where the ultimate issues are to be decided by a jury. *Id.* But see *Berland* v. *Mack, supra* at 132.

In this case, the most efficient way for the court to become sufficiently aware of the merits of plaintiff's claims to make a reasoned decision on the cost of notice is to hold a preliminary hearing on the merits similar to that originally suggested in *Dolgow* v. *Anderson, supra* at 501. Although such a hearing has been considered and rejected by several courts, the facts and circumstances of those cases were markedly different from those at hand, thereby rendering those decisions distinguishable.[15]

Holding a preliminary hearing at this stage will allow the parties to conduct significant discovery, limited by the date set for the hearing. See *Dolgow* v. *Anderson, supra* at 502. There may be some duplication of discovery if notice should eventually go out and other counsel for plaintiffs intervene, but the court undoubtedly will be able to control any such problems.

15. See *City of Philadelphia* v. *Emhart Corp.*, 14 F.R. Serv.2d 332, 334 (E.D. Pa. 1970); *Fogel* v. *Wolfgang*, 47 F.R.D. 213, 215 n.4 (S.D.N.Y. 1969); *Berland* v. *Mack, supra* at 132; *Mersay* v. *First Republic Corporation of America*, 43 F.R.D. 465, 469 (S.D.N.Y. 1968). But see *Green* v. *Wolf Corp., supra* at 301 n.15; *Cannon* v. *Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969).

The preliminary hearing will also serve to place the risk of success equally upon the class and defendants without requiring a crucial determination prematurely. Although it is true that counsel for other class members who later choose to intervene will not be able to participate in this preliminary hearing, this is a necessary concomitant of the procedures required by Rule 23. Moreover, the court has already determined that plaintiff's counsel adequately represents the class.

I have also determined that a preliminary hearing is superior to other possible procedures. One such alternative would be to allow the action to proceed to a determination on the merits before assessing the costs of notice and send notice only if plaintiff is successful. Compare *Union Carbide and Carbon Corporation* v. *Nisley, supra* with *Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). This suggestion must be rejected for several reasons: (1) it is at least theoretically contrary to the language of Rule 23 calling for an early determination of the class action question; (2) in effect it amounts to "one-way intervention," a procedure the rule was designed to avoid, Advisory Committee's Note, *supra* at 105-06; (3) counsel for other class members may desire to participate at an early stage. Another alternative might be to simply allow the action to proceed with discovery and pre-trial motions, postponing a decision on the cost of notice until some unspecified later date. See *City of Philadelphia* v. *Emhart Corp., supra* at 335-36. This, however, may well lead to a point at which the court and the parties become "hopelessly entangled in a mass of procedural detail and expense." *Eisen II* at 570.

Finally, after the hearing and after all papers have been submitted, a motion for summary judgment by either side may be appropriate, cf. F.R.Civ.P. Rule 12(b)(6), but I am quick to point out my reluctance to treat the proceedings as a forerunner to such a motion and my inclination to limit

any determination solely to the question of who shall bear the expense of the Rule 23(c)(2) notice. See *Dolgow* v. *Anderson*, —— F.2d ——, Docket No. 33719 (2d Cir., filed Sept. 2, 1970). Summary judgment is such a drastic remedy that only in the most compelling circumstances should it be considered without opportunity for participation by other class members.

C. *Nature of Preliminary Hearing*

The preliminary hearing will be commenced no later than 60 days from the date of the filing of this opinion. This should allow sufficient time for minimum necessary discovery and at the same time prevent the proceedings from continuing longer than absolutely necessary. The hearing itself should be brief, and the parties are encouraged to submit whatever evidence they deem relevant in the form of stipulations, affidavits or depositions to the extent that they are practicable. Actual testimony should be required only from very important witnesses.

As to the merits of the controversy, the parties are directed to address the following issues: (1) did the brokerage defendants monopolize the odd-lot market on the NYSE from 1962 to 1966; (2) did the brokerage defendants control the competition and the odd-lot differential charge in such market; (3) if such conduct by the brokerage defendants can be shown, did the NYSE breach its duties to investors under the Securities Exchange Act of 1934 by failing to exercise proper control; (4) what were the effects of the alleged anticompetitive conduct; (5) to what extent did the Securities and Exchange Commission exercise actual supervision and review over the conduct of defendants in the odd-lot field during the relevant period; (6) to what extent did the regulatory scheme set up under the Securities Exchange Act of 1934 perform an antitrust function; (7) was the conduct of defendants necessary to make the Securities Exchange Act of 1934 work? See, generally,

Silver v. *New York Stock Exchange, supra; United States* v. *E. I. duPont de Nemours Co.*, 351 U.S. 377 (1956); *Thill Securities Corporation* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970); 15 U.S.C. §§78a *et seq.* (1964). Amicus brief will be invited from the SEC and the Antitrust Division of the Justice Department. See *Thill Securities Corporation* v. *New York Stock Exchange, supra* at 273.

After the hearing the following alternative courses of action are open to the court, all subject to reallocation after trial: (1) plaintiff might be required to pay the entire cost of notice; (2) plaintiff and defendants might share the cost in a proportion to be decided; (3) defendants might be required to pay for a major portion of the cost with plaintiff paying a substantial amount and posting a bond for the balance allocated to defendants, cf. F.R.Civ.P. Rule 65(c); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333 (1959).

In summary, for the reasons discussed above I have determined that this suit is a proper class action under F.R.Civ.P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such. The parties are directed to expedite discovery and preparation for the preliminary hearing as outlined in this opinion.

Finally, it should be recalled that the Court of Appeals in *Eisen II* (at 570) expressly retained jurisdiction of the class action determination issue. Admitting to some uncertainty on the point, I believe that in the interests of orderly procedure and a complete record, any appeal should await the outcome of the preliminary hearing directed in this opinion.

It is so ordered.

Dated: New York, N. Y.
April 7, 1971.

H. R. Tyler, Jr.
U.S.D.J.

Appendix A to Opinion of Tyler, J.

Geographic Distribution of Shareowners of Public Corporations

State	*Number of Shareowners (thousands)*			
	1956	1959	1962	1965
Alabama	30	87	114	172
Alaska	—	3	5	9
Arizona	33	62	95	179
Arkansas	17	50	58	94
California	1,011	1,480	2,037	2,540
Colorado	75	112	157	240
Connecticut	219	300	459	505
Delaware	37	50	75	79
Dist. of Columbia	57	112	126	121
Florida	172	312	522	704
Georgia	65	137	170	243
Hawaii	—	13	18	39
Idaho	10	26	33	43
Illinois	732	874	1,157	1,308
Indiana	117	237	374	382
Iowa	78	125	187	202
Kansas	54	112	157	221
Kentucky	53	100	124	161
Louisiana	64	100	151	149
Maine	56	75	94	123
Maryland	144	237	367	424
Massachusetts	531	512	681	805
Michigan	370	625	794	946
Minnesota	110	175	255	260
Mississippi	15	38	61	92
Missouri	178	325	408	501
Montana	29	37	59	61

Appendix A

State	Number of Shareowners (thousands)			
	1956	1959	1962	1965
Nebraska	36	50	90	99
Nevada	11	13	23	42
New Hampshire	59	50	75	101
New Jersey	554	625	902	1,086
New Mexico	10	37	46	60
New York	1,699	1,903	2,341	2,407
North Carolina	50	125	238	322
North Dakota	11	12	36	30
Ohio	317	587	791	865
Oklahoma	51	100	134	181
Oregon	54	100	152	200
Pennsylvania	671	1,024	1,378	1,408
Rhode Island	84	75	99	122
South Carolina	19	63	71	117
South Dakota	18	25	38	40
Tennessee	57	100	134	201
Texas	160	375	517	744
Utah	23	37	50	78
Vermont	29	37	55	72
Virginia	120	250	302	422
Washington	77	149	202	262
West Virginia	58	100	102	100
Wisconsin	167	212	323	360
Wyoming	12	26	30	41
U. S. Terr. & Poss.	8	3	5	14
Foreign Countries—U. S. Citizens Living Abroad	18	96	138	143

Appendix B to Opinion of Tyler, J.

	Full Page	*½ Page*	*¼ Page*	*Circ.*
Wall St. Journal				
National	$19,855.68	$9,927.84	$4,963.92	1,262,000
Eastern	7,672.32	3,836.14	1,918.08	520,000
Midwest Edition	6,287.04	3,143.52	1,571.76	390,000
Pacific Coast	3,907.20	1,953.60	976.80	231,000
Southwest	2,344.32	1,172.16	586.08	120,000
New York				
News—Full Run (Daily)	5,530.00	2,765.00	1,382.50	2,130,000
News—City & Sub.	4,940.00	2,470.00	1,235.00	1,805,000
Post	3,492.00	1,746.00	873.00	698,845
Times	8,400.00	4,200.00	2,100.00	977,297
Chicago				
News	3,918.40	1,959.20	1,066.40	453,000
News (Sun. Times—City & Sub.)	2,899.00	1,574.80	787.40	402,000
News (Sun. Times—Full Run)	3,188.90	1,732.28	866.14	453,000
Sun-Times	1,875.00	1,026.00	427.50	530,000
Sun-Times (News—City-Sub.)	1,650.00	906.00	453.00	506,000
Sun-Times—News—Full Run	1,815.00	1,122.00	561.00	530,000
Today—Full Run	1,537.00	864.00	432.00	435,000
Today—(City-Sub.)	1,175.00	720.00	360.00	422,000
Today (Tribune) Full Run (C.&S.)	1,175.00	720.00	360.00	422,000
Tribune Full Run	5,498.00	2,876.80	1,531.00	768,000
Tribune (City & Sub.)	4,615.00	2,467.60	1,351.60	623,000
Tribune (Today) Full Run	4,876.00	2,592.00	1,296.00	768,000
Tribune (Today) (City & Sub.)	4,154.00	2,219.00	1,215.00	623,000
Los Angeles				
Herald Examiner	4,009.60	2,004.80	1,052.80	503,000
Times	5,424.00	3,120.00	1,560.00	982,000
San Francisco				
Chronicle	5,658.80	2,829.40	1,414.70	480,000
Examiner	3,347.12	1,673.56	836.78	204,000
Chronicle/Examiner	6,742.40	3,371.20	1,685.60	684,000
London				
Daily Express (D.M.)	12,600.00	6,300.00	3,150.00	3,947,500
Daily Mail (D.M.)	7,800.00	3,900.00	1,950.00	1,992,500
Daily Mirror (D.M.)	9,674.00	4,837.00	2,419.00	4,924,000
Daily Sketch (D.M.)	1,910.00	955.00	475.00	900,000
Daily Tele. & Sun. Tel. (D.M.)	9,300.00	4,650.00	1,325.00	1,400,000
Evening News (D.E.)	7,865.00	3,933.00	1,966.00	1,088,500
Evening Standard (D.E.)	2,886.00	1,440.00	720.00	595,000
Financial Times (Wkly. Bus.)	5,069.00	2,535.00	1,267.00	172,347
Greyhound Express (D.M.)	436.00	218.00	109.00	68,000

Appendix B

	Full Page	*½ Page*	*¼ Page*	*Circ.*
don (cont'd)				
he Guardian (D.M.)	3,600.00	1,800.00	900.00	293,000
v. Chr. & Stock Ex. Gaz. (W.B.)	600.00	300.00	125.00	50,000
orning Star (D.M.)	720.00	360.00	180.00	62,000
ews of the World (Wkly)	20,259.00	10,129.00	5,065.00	6,228,000
bserver (Weekly)	8,025.00	4,013.00	2,006.00	879,000
he People (Weekly)	17,280.00	8,640.00	4,320.00	5,455,500
nday Express (Weekly)	16,200.00	8,100.00	4,050.00	4,206,500
he Sunday Times (Weekly)	12,672.00	6,336.00	3,168.00	1,500,000
he Times (D.M.)	5,750.00	2,875.00	1,438.00	437,500
n (D.M.)	1,815.00	908.00	454.00	951,000
nday Mirror (Wkly)	9,758.00	4,879.00	2,440.00	5,009,000
s				
'Aurore (D.M.)	3,825.00	1,913.00	956.00	329,000
'Equipe (D.M.)	2,253.00	1,127.00	563.00	365,000
e Figaro (D.M.)	4,052.00	2,021.00	1,013.00	424,500
rance—Dimanche (Wkly)	7,659.00	3,830.00	1,915.00	1,270,500
rance—Soir (D.E.)	9,400.00	4,700.00	2,350.00	1,049,000
e Herisson—La Presse (Wkly)	2,273.00	1,137.00	568.00	400,000
i Paris (Wkly)	6,052.00	3,026.00	1,513.00	981,000
e Journal du Dimanche (W.B.)	4,550.00	2,275.00	1,137.00	550,000
inute (Weekly)	1,470.00	735.00	368.00	151,500
e Monde (D.E.)	3,310.00	1,655.00	828.00	355,000
aris-Jour (D.M.)	1,430.00	715.00	358.00	257,500
aris-Presse-l'Intransigeant (D.M.)	2,478.00	1,239.00	620.00	50,000
e Parisien Libere (D.M.)	8,583.00	4,292.00	2,146.00	778,000
a Vie Francaise (W.B.)	3,550.00	1,775.00	838.00	102,500
e				
vanti	2,048.00	1,024.00	512.00	130,000
orrieredello Sport (D.M.)	2,306.00	1,153.00	577.00	191,500
ily American (D.M.)	1,891.00	946.00	473.00	36,000
iornale d'Italia (D.E.)	2,884.00	1,442.00	721.00	90,000
Globo (D.E.)	2,388.00	1,194.00	597.00	35,000
Messaggero (D.M.)	4,450.00	2,225.00	1,113.00	301,000
omento Sera (D.E.)	2,336.00	1,168.00	584.00	80,000
'Osservatore Romano (D.M.)	2,453.00	1,227.00	614.00	70,000
ese Sera (D.)	3,116.00	1,558.00	779.00	180,500
Popolo (D.M.)	2,160.00	1,080.00	540.00	106,000
Tempo (D.M.)	3,895.00	1,947.00	974.00	220,000
Fiorine (D.M.B.)	2,670.00	1,335.00	667.00	49,000

M. = Daily Morning
E. = Daily Evening
= Daily
B. = Weekly Business
S. = City & Suburban

Appendix C to Opinion of Tyler, J.

Plaintiff has brought an action in the United States District Court for the Southern District of New York on his own behalf and on behalf of all other persons who had an odd-lot transaction on the New York Stock Exchange in the period 1962-1966 (the "class"). The defendants are Carlisle & Jacquelin, DeCoppet & Doremus (referred to collectively for convenience as the "brokerage firm defendants") and the New York Stock Exchange. The essence of the action is the allegations that the brokerage firm defendants have monopolized the odd-lot business of the New York Stock Exchange and have conspired to fix an excessive odd-lot differential (the odd-lot differential being the extra amount charged when a transaction on the stock exchange involves fewer than 100 shares) in violation of the anti-trust laws of the United States. It is further alleged that the New York Stock Exchange knew of these wrongs but permitted them to occur. Defendants have denied all the material allegations of the complaint and have denied any wrongdoing whatsoever. The issues of whether any of the defendants are liable and the extent of such liability are complicated and have not yet been determined by the Court.

Since it would be impracticable to return to each member of the class his precise damages the Court has ruled that any recovery, to the extent not asserted by members of the class, will be offset against the odd-lot differential charged in the future.

If you are a member of the class you may be excluded from the class if you so request in writing by [a given date]. A judgment in this case, whether favorable or not, will include all class members who do not request exclusion. Any member who does not request exclusion may, if he desires, enter an appearance through his counsel. You should be advised, however, that if you do choose to be excluded

from the class you may be prevented from bringing your own action because of the running of the statute of limitations.

If you choose to be excluded from the class or if you desire to be represented by your own counsel, please notify the Court by writing to: The Clerk of the Court, United States District Court, Southern District of New York, Box ————, ———————— Post Office, New York, New York.

Opinion of Tyler, J., Dated April 4, 1972 Providing that Defendant Shall Bear 90% of Costs of Notice to Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This case is currently on remand from the Court of Appeals for class action determination. In deciding whether this case could be maintained as a class action, this court was directed to consider "* * * questions of notice, adequate representation, effective administration of the action, and any other matters which the District Court may consider pertinent and proper." *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 570 (2d Cir., 1968). After able response by the parties to these and other issues, it was decided that this case could and should be maintained as a class action. *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y., 1971); at the same time, however, decision on the issue of the allocation of the costs of notice of that status to the class was reserved. Specifically, in recognition of the fact that cost of notice as required might impose unfair burdens upon either plaintiff or defendants, it was decided to hold a preliminary hearing on the merits to determine whether, and, if so, how such costs might be allocated among the parties. In this preliminary hearing, the parties were afforded the opportunity to present evidence showing "* * * 'the likelihood that one party or the other would prevail at trial' * * *" *Dolgow* v. *Anderson*, 43 F.R.D. 472, 502 (E.D.N.Y., 1968). If, after the hearing, the evidence showed that the "* * * chances of ultimate success of plaintiff and the class were sustained", *Dolgow* v. *Anderson*, 438 F.2d 825, 827 (2d Cir., 1971), defendants

would be required to pay all or part of the costs of notice. *Eisen* v. *Carlisle & Jacquelin, supra,* 52 F.R.D. at 272.

The "mini-hearing", as this preliminary hearing has come to be termed, was held on February 9, 1972. No oral testimony was taken, the parties preferring instead to rely on submission of voluminous documentary evidence. Argument by counsel was heard, and briefs were submitted thereafter. There follow findings of fact and conclusions of law concerning plaintiff's anti-trust and "failure to regulate" claims which are based on evidence currently before this court. They may be considered binding on the parties and court only for the stated purpose of the hearing; the allocation of the cost of notice. Thus, they may not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination.[1]

Briefly stated, plaintiff asserts that he and the class were injured by various anti-competitive practices of defendants. Specifically, plaintiff complains that in establishing differentials to be added to the price of odd-lot stock traded over the New York and other exchanges, defendants were guilty of *per se* violations of the antitrust laws. Plaintiff further complains that the class was injured by the New York Stock Exchange's alleged failure to regulate odd-lot transactions as it is required to do by the terms of the Securities Exchange Act of 1934 ("the Act").

On the basis of the evidence presently before the court, I conclude that plaintiff class is more than likely to prevail on both of these claims and that defendants must therefore bear the major share (90%) of the cost of notice to the class.

1. Plaintiff's counsel have argued that the merits of this case can be reached on motions for summary judgment—and that the present record before the court is complete for such resolution. Even if this be true, this court declines, as stated in the text, to treat this case on the merits at this juncture.

FINDINGS OF FACT

1. The defendant odd-lot firms, Carlisle & Jacquelin and DeCoppet & Doremus (the "odd-lot defendants"), during the years 1960 to 1966 enjoyed a monopoly of odd-lot transactions over the New York Stock Exchange ("the Exchange").

2. Prior to the enactment of the Act, the differentials charged by odd-lot firms operating over the Exchange were set by agreements among the firms themselves with the approval of the Board of Governors of the Exchange. This procedure was not essentially changed after the enactment of the Act until 1966 when the Exchange adopted a rule establishing odd-lot differentials.

3. The Exchange in 1934 filed a registration statement with the Securities and Exchange Commission. In that document and in annual amendments filed with respect thereto, the Exchange described its regulation of odd-lot firms as follows:

> "Transactions in odd-lots are effected on this Exchange under methods which have been prescribed by the odd-lot brokers and dealers with the *acquiescence* of the Exchange." (emphasis supplied)

4. Prior to 1964, the Exchange had adopted five rules pertaining to odd-lot transactions. None of these rules in any way pertained to or sought to regulate the differentials to be charged in odd-lot transactions. These five rules, which can only be said to apply to peripheral matters, constituted the only formal regulation of odd-lot brokers and dealers by the Exchange.

5. Prior to its adoption of Exchange Rule #125 in 1964, the Exchange was the only national exchange not to have established rules regulating odd-lot differentials.

6. In 1938, in addition to the two odd-lot defendants, four smaller specialist firms were also transacting odd-lot business on the Exchange. These smaller firms, which at that time accounted for 2½% of all odd-lot business on the Exchange, had adopted the practice of absorbing transfer taxes in their odd-lot sales. The odd-lot defendants, who chose not to absorb these costs, complained of these competitive practices to the Exchange's Committee on Floor Practice. After confidential hearings, the Committee decided:

> "* * * that the differentials at which odd-lot dealers do business should be the same. The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of members."

The Committee then decided that henceforth it would be the policy of the Exchange to "* * * withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted." The effect of this determination, not surprisingly, was that the smaller odd-lot firms were forced to charge the same differential as the odd-lot defendants.

7. The 1938 Committee report, hearings, and the policy generated thereby were never disclosed to the public. Indeed, the Commission, which was not notified by amendment to the Exchange's registration statement or by any other official means, apparently first became aware of this policy during the course of its Special Study investigations.

8. While there has been no price competition between odd-lot firms since 1938, the firms have competed in terms

of services provided for commission houses. The benefits of these services, which include interest free loans and market information, enure to the commission houses rather than to investors. On the other hand, the differentials, which are not paid by commission firms, affect only the investing public.

9. The 1938 Committee policy or "ruling" had a devastating effect upon the smaller odd-lot firms which did not have the resources to compete with the odd-lot defendants in services and thus were dependent upon some sort of price competition in order to attract and maintain business. The Exchange policy, which foreclosed price competition, insured the ultimate demise of the smaller odd-lot firms.

10. In 1941, the odd-lot dealers decided to increase the differential on stock selling below *$1.00*. Upon receipt of notice of this increase from the Exchange, the Commission inquired as to whether public disclosure of the new differential would be announced to the public. In response to this query the Exchange replied as follows:

> "The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100 share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore, it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change."

11. In 1950, the Commission's then Director of the Division of Trading and Exchanges wrote the Exchange: "[W]e feel that the Exchange should consider the advisability of adopting rules, regulations, or interpretations

reduced to writing which would govern the existing operational methods" of the odd-lot dealers. The Exchange replied that it was reluctant to do so and the matter was dropped until the Exchange adopted Rule 125 at the Commission's request in 1964.

12. Prior to July, 1951, odd-lot firms charged a differential of ⅛ point on all stock selling for more than $1.00. In 1947, the odd-lot defendants began discussing the feasibility of increasing the differential. By December, 1950, the odd-lot defendants had agreed between themselves to increase the differential to ¼ point on all shares selling for more than $60.00. The proposed $60.00 breakpoint was informally presented by the odd-lot defendants to the Exchange, but was not mentioned to the other firms also engaged in odd-lot transactions over the Exchange. The Exchange disclaimed jurisdiction over the proposed differential increase but informally expressed the opinion that it had no objection to its implementation. Thereupon, the odd-lot defendants decided to seek approval of their proposed increase of differentials from the Commission. Accordingly, they jointly hired counsel who presented their case to the Commission. While doubting that it had jurisdiction, the Commission stated that it had no objection to implementation of the new differentials.

13. The odd-lot defendants, realizing that they would lose business if odd-lot firms on other exchanges continued to charge a lower differential, sought to have the other exchanges raise their differentials to accord with their own. The odd-lot defendants turned first to the Midwest Exchange ("Midwest"), which had been considering conversion to a decimal differential system which, in some cases, would have offered cheaper rates to investors. Midwest, which had its own reasons for wanting a decimal system,

at first refused to accept the differentials proposed by the odd-lot defendants. After protracted and fruitless negotiations, the odd-lot defendants told Midwest that they would be willing to drop the breakpoint below $60.00 but, if Midwest did not come to terms, they would increase their differential only on stock not traded over regional exchanges—thereby increasing their profits without conferring benefit upon members of Midwest and other regional exchanges. Midwest capitulated and agreed with the odd-lot defendants to accept a breakpoint of $40.00.

14. As a part of their agreement, Midwest undertook to insure that all of the western exchanges would agree to charge the new differential with the $40.00 breakpoint. The odd-lot defendants agreed to see to it that the eastern exchanges did likewise. The president of Midwest also sought Commission approval for the new rates to be charged on all exchanges. On July 16, 1951, the Commission advised that it would not object to a $40.00 breakpoint.

15. Of all the regional exchanges approached by Midwest and the odd-lot defendants, only the Boston Exchange ("Boston") refused to raise its differentials. Boston's members reasoned that if their odd-lot differentials were lower, they might expect additional odd-lot business to come their way. Accordingly, on July 9, 1951, the Boston odd-lot traders unanimously resolved that they would not increase their differentials.

16. The president of the Boston Exchange informed the Exchange that Boston would not advertise its lower differential in order to increase its odd-lot business. Boston's president has testified on another occasion that he made this promise in fear of retaliation from the Exchange. This concern stemmed in part from the Exchange's threat

in 1940 to restrict the use of its members' funds in odd-lot transactions on other exchanges. Furthermore, many of Boston's members relied upon the Exchange for financing, up to date price quotations and the clearing facilities of various dual memberships.

17. On the regional exchanges, odd-lot transactions are handled by stock specialists instead of specialized odd-lot firms as they are on the Exchange. Odd-lot business is very important to these regional specialists and to the exchanges on which they operate. For example, while odd-lot transactions accounted for about 10% of the Exchange's business, they approximated 48% of Boston's share volume.

18. On July 20, 1951, representatives of the odd-lot defendants and the Exchange met to discuss notice of the increased differentials. At this meeting, the Exchange disassociated itself from the release, but agreed to respond to public inquiry concerning the increase. In order to be able to answer such questions, the Exchange, which theretofore apparently had neither sought nor received any data to support the new differentials, requested that the odd-lot defendants furnish information in support of the increase at that late date.

19. Shortly before the increase was publicly announced, the then existing smaller odd-lot firms trading over the Exchange were informed for the first time of the raised differentials and asked to sign the announcement. One such firm refused to sign, but, fearful that it would be suspended in accordance with the 1938 Committee policy, went along and charged the increased differential.

20. On July 25, 1951, the odd-lot firms issued a release addressed to member firms of the Exchange announcing

that they were going to charge new differentials. This release apparently invited no public discussion and none ensued, perhaps because the release was virtually simultaneous with the effective date of the increase.[2]

21. In August, 1951, the Boston Exchange, despite its ban on advertising, began to experience an increase in odd-lot business. This created some dissention in the Boston ranks. Some of the Boston dealers, particularly the smaller ones, began to urge advertisement of the lower differentials in effect on their exchange in order to increase business. The larger Boston brokers, who had dual memberships and were more sensitive to pressure from the Exchange, advocated that Boston's differential be raised to correspond with that charged elsewhere.

22. In October, 1951, the Boston Governing Committee polled its members to see whether Boston should also raise its differentials. The result of the poll was 42 to 41 in favor of retention of the ⅛ point differential. Nevertheless, Boston raised its rates shortly thereafter, claiming that the dealers who had voted for the higher differential, although numerically a minority, actually conducted 75% of the odd-lot business.

23. In 1956, the Exchange engaged Ebasco Services, Inc. to study Exchange methods and make proposals for their modernization. In due course, Ebasco studied odd-lots and made proposals for modernization of odd-lot procedures. The odd-lot defendants, fearing a decrease of the differential among other things, opposed the Ebasco proposals and succeeded in defeating implementation thereof.

2. Nowhere in the evidence before me do I find the full text of the July 25, 1951 release or the effective date of the new differentials. I infer, however, from the *SEC Special Study* and the portion of the release contained therein, that notice of the new differentials and the implementation thereof were nearly, if not actually, simultaneous. SEC, *Report of Special Study of Securities Markets,* H.R. Doc. No. 95, Pt. 2 at 183 (1963).

Although the differentials were reduced in 1966, the Ebasco proposals, which would have substantially cut the costs of odd-lot transactions, remain unconsidered and unimplemented.

CONCLUSIONS OF ULTIMATE FACT AND LAW

1. The odd-lot defendants fixed the differentials or prices, to be charged in odd-lot transactions over the Exchange. These rates which were fixed in 1951 were in effect until 1966.

2. The odd-lot defendants fixed the differentials to be charged on other exchanges in 1951. These differentials were also in effect in the early 1960's.

3. The Exchange was an active participant in these price fixing arrangements. This participation took the form of failure to regulate, acquiescence in the increase, and maintenance of its 1938 policy of enforcing the odd-lot defendants' rates upon others.

4. Plaintiff and the class have established that they may likely carry their burden of producing evidence that the defendants fixed prices. Under the *per se* rule, once this showing has been made, judgment must follow and the court need not consider any defenses such as the reasonableness of the price formula or the fact that the public has not been harmed. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *U.S.* v. *Trenton Potteries*, 273 U.S. 392 (1927).

5. Defendants urge this court to apply the rule of reason, which "* * * permits the courts to decide whether conduct is significantly and unreasonably anti-competitive in character and effect." *Report of The Attorney Gen-*

eral's National Committee To Study the Antitrust Laws, 11 (1955). The rule is not, however, unlimited in scope and will operate to excuse only conduct that can be shown to be incidental or ancillary to competition. See, e.g. *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933). The rule of reason almost certainly is inapplicable to this case, however, since price fixing agreements are conclusively presumed anti-competitive in both purpose and effect. See *United States* v. *Trenton Potteries, Co., supra* at 396-398. "In such cases, inquiry under the Rule of Reason is over once it has been decided that the conspiracy or agreement under review in fact constitutes price rigging * * *" *Report of the Attorney General, supra* at 11.

Defendants also argue that application of the rule of reason to an allegedly analogous situation in *United States* v. *Morgan,* 118 F. Supp. 621, 688-691 (S.D.N.Y., 1953) indicates that it should pertain here. In *Morgan,* however, Judge Medina found that the restraints there at issue affected neither competitors nor market prices. *Ibid.,* 118 F. Supp. at 689. Because the facts here tend to show that competitors and market prices were directly affected, *Morgan* may be said to stand for the proposition that the rule of reason should be applied to this case.

6. The defendants also claim that they are immune from anti-trust liability as theirs is a regulated industry. Specifically, defendants argue that insofar as the Exchange is vested with self-regulatory powers, its approval of the differentials protects both it and the odd-lot defendants from anti-trust scrutiny. While *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), which held that self-regulatory acts by the Exchange are exempt from antitrust laws only to the extent necessary to effectuate the purposes of the Exchange Act, might be read to refute this claim without more, defendants strike two separately stated

arguments off the *Silver* analysis. First, they urge that because the effect of self-regulatory acts must be investigated to ascertain whether they are necessary to fulfill the commands of the Act, it follows that the *per se* rule cannot be applied at all. This view, as defendants see it, is supported by *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N.D. Ill., 1966), aff'd. 371 F.2d 409 (7th Cir.), cert. den. 389 U.S. 954 (1967). Second, it is urged that the violation here complained of, the fixing of odd-lot differentials, is mandated by and necessary to implement the Act.

In my view, these two arguments are logically one—and the latter statement of that one argument is the better articulation. In other words, the question of whether or not the *per se* rule is applicable, see discussion *supra*, is a separate question from that of whether or not the Exchange's regulatory approval of fixed differentials was within the purview of the Act and necessary to its implementation. On the other hand, if defendants are correct that fixing of the differentials with Exchange approval was proper and necessary to implement the Act, they presumably would have a complete defense to this action. For reasons to be hereinafter summarized, it is doubtful that such a defense can be sustained. Certainly, regulation of odd-lot differentials is within the scope of, mandated by and necessary to the implementation of the purposes and intent of the Act. See 15 U.S.C. §§78 and 78s. Further, if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or "benign acquiescence" can be considered to constitute regulation mandated by the Act. Even if it could be so considered, such "regulation"

scarcely would be immunized from judicial review. To illustrate, defendants may have failed to consider that when the Exchange exercises its self-regulatory powers, it owes at least its members, if not others, certain procedural safeguards such as notice and the opportunity to be heard. In its "regulation" of odd-lot differentials, the Exchange provided notice to no one and afforded only the odd-lot defendants an opportunity to be heard. Therefore, plaintiff and the class have a powerful claim that "* * * the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation." *Silver, supra,* 373 U.S. at 365.

7. Defendants next argue that the Commission's approval rendered the differentials the "legal" rate and that thus they cannot be held liable, even though that rate was initially fixed in violation of the antitrust laws. *Keogh* v. *Chicago & Northwestern Railroad Co.,* 260 U.S. 156 (1922). It is at least questionable whether the Commission, while doubting its jurisdiction to do so, could grant administrative approval in the sense to which *Keogh* refers. This argument need not be reached, however, since *Keogh* and its progeny are to be applied only "* * * in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 351 (1963). Insofar as *Silver, supra,* has made it clear that a "plain repugnancy" does not exist between the Act and the antitrust laws, the *Keogh* doctrine is of no applicability here.

8. Finally, defendants claim that plaintiff and the class are barred from seeking damages since they failed to complain of the differentials to the Commission under the provi-

sions of the Administrative Procedure Act, 5 U.S.C. §8551 *et seq.* While this argument might have some force if that agency could provide the relief here sought, the Commission is clearly powerless to do so. Although the Commission can consider antitrust matters, as can any other regulatory agency, see *The Rules of the New York Stock Exchange,* 10 S.E.C. 270 (1941), it does not have primary jurisdiction thereof. *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264, 272 (7th Cir., 1970). Furthermore, the Exchange, which could not be an "aggrieved person", has no standing to commence antitrust suits, see *Hawaii* v. *Standard Oil of California,* No. 70-49 (U.S. Supreme Court, March 1, 1972), and, of course, could not entertain a class suit or award damages. Indeed, the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966. To now bar plaintiff from seeking recovery of damages incurred prior to 1966 would be unjust and would needlessly sacrifice "* * * the benefits of competition acknowledged by Congress." *United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 189 (1968).

9. Concerning plaintiff's claim against the Exchange for failure to regulate, the Exchange may well be liable to plaintiff and the class for a violation of its statutory duty to regulate its members, provided that (1) damage can be shown, *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.) *cert. den.* 323 U.S. 737 (1944), and (2) there is proof that the Exchange either knew or had reason to know that its rules were being violated. *Pettit* v. *American Stock Exchange,* 217 F. Supp. 21, 29-30 (S.D.N.Y., 1963). It has recently been held that the Exchange may also be civilly liable for a failure to regulate its membership under a third party beneficiary theory. *Weinberger* v. *New York Stock Exchange,* 335 F. Supp. 139, 144 (S.D.N.Y., 1971).

Defendant Exchange acknowledges these cases but asserts that they are distinguishable as they all concern the failure of the Exchange to adhere to its own rules and not the failure to create rules. This is likely to be a distinction without a difference. Moreover, the argument ignores the fact that the duty to regulate springs from the Act and not from any rule the Exchange might adopt thereunder. At the very least, the Exchange is under a "* * * twofold duty * * * of enacting certain rules and regulations and of seeing that they are enforced." *Baird* v. *Franklin, supra,* 141 F.2d at 244.

Plaintiff has excellent evidence that the Exchange has not satisfied either of these duties. As has been repeatedly stated herein, no rules concerning odd-lot differentials were enacted or approved by the Exchange, notwithstanding the rather plain requirements of Sections 6 and 19 of the Act. 15 U.S.C. §78f and §78s. The "practices" which the Exchange claims satisfied its duties with regard to the differentials could be interpreted as no more than complicity in the price fixing schemes of the odd-lot defendants or an example of the Exchange's "* * * inability or unwillingness to curb abuses * * *" *Silver, supra* at 351. In sum, plaintiff and the class have a strong case that the Exchange acquiesced to increased differentials with at least constructive knowledge that resulting increased costs to the investing public would benefit only a select few of its members—i.e. that the Exchange condoned one of the very abuses which the Act was passed to curb.

Allocation of Cost of Notice

On the basis of the foregoing, it appears that plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment. Rule 56, F.R.Civ.P. I conclude, therefore, that defendants should

bear 90% of the costs of Rule 23 (c)(2), F.R.Civ.P. notice to the class. Of defendants' share, one-half should be borne by the Exchange and one-half by the odd-lot defendants. The remaining 10%, which represents the "hazards of litigation", must be put up by plaintiff.

It is so ordered.

Dated: April 4, 1972

H. R. Tyler, Jr.
U.S.D.J.

Order of the United States Court of Appeals for the Second Circuit Dated May 1, 1972, Granting Motion to Order Transmission of the Record

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to direct the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the Clerk of the United States Court of Appeals for the Second Circuit be and it hereby is granted.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays
Circuit Judges

May 1st, 1972

Defendants' Notice of Appeal from Orders Entered on April 7, 1971 and April 4, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Notice is hereby given that defendants Carlisle & Jacquelin, DeCoppet & Doremus, and New York Stock Exchange, Inc. hereby appeal to the United States Court of Appeals for the Second Circuit from the decisions, opinions and orders entered in this case on April 7, 1971 and April 4, 1972 by Hon. Harold R. Tyler, U.S.D.J., on remand.

Dated: New York, N.Y.
May 2, 1972

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Defendants' Notice of Appeal

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Court of Appeals Order 6/29/72

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of June, one thousand nine hundred and seventy-two.

Morton Eisen, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

Carlisle & Jacquelin and DeCoppet & Doremus, each limited partnerships under New York Partnership Law, Article 8, and New York Stock Exchange, an unincorporated association,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1972, to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is denied.

HAROLD R. MEDINA,
J. EDWARD LUMBARD,
PAUL R. HAYS,
Circuit Judges.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 381—September Term, 1972.

(Argued December 12, 1972 Decided May 1, 1973.)

Docket Nos. 72-1521, 30934

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, holding that suit by investor on behalf of himself and other odd-lot stock investors against major odd-lot dealers on New York Stock Exchange and against New York Stock Exchange, was maintainable as a class action, and, following a preliminary hearing, ordering the defendants to bear 90% of the costs of notice.

The action was originally dismissed as a class action, 41 F.R.D. 147, and this Court reversed and remanded to the District Court for further findings necessary for the class action determination, 391 F.2d 555. Jurisdiction was retained by this Court.

Reversed.

AARON M. FINE, Philadelphia, Pennsylvania (Harold E. Kohn and Allen D. Black, Philadelphia, Pennsylvania, and Mordecai Rosenfeld, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

DEVEREUX MILBURN, New York, N.Y. (Louis L. Stanton, Jr., James E. Massey, and Carter, Ledyard & Milburn, New York, N.Y., on the brief), *for Defendant-Appellee Carlisle & Jacquelin.*

FRANCIS S. BENSEL, New York, N.Y. (Bud G. Holman and Kelley Drye Warren Clark Carr & Ellis, New York, N.Y., on the brief), *for Defendant-Appellee DeCoppet & Doremus.*

WILLIAM E. JACKSON, New York, N.Y. (Russell E. Brooks and Milbank, Tweed, Hadley & McCloy, New York, N.Y., on the brief), *for Defendant-Appellee New York Stock Exchange, Inc.*

MEDINA, *Circuit Judge:*

Sufficient factual background for an understanding of the rulings we are about to make in this extraordinary "class action" is to be found in our first opinion *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555 (1968), often referred

to as *Eisen II*. On that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction.[1] While enter-

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1 We retained jurisdiction because of the doubt engendered by the phraseology of the "death knell" opinion, *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (*Eisen I*). We thought this case might be construed as making appealable an interlocutory order dismissing a case as a class action "because no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen," see *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), but perhaps denying appealability to a similar order holding the case to be a proper class action under amended Rule 23. While the "death knell" doctrine has been criticized by the Third Circuit in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972), we think the consequences of class action rulings are so serious that these interlocutory orders should be made appealable, provided we adopt the view expressed by Chief Judge Friendly in *Korn* v. *Franchard Corp.*, *supra*, 443 F.2d at 1307, to the effect that this Court should formulate the rule of appealability in such fashion that it "will afford equality of treatment as between plaintiffs and defendants." The same considerations which led this Circuit to apply the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

The "collateral order" doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause "irreparable harm" to the complaining party. The seeds of *Cohen* were sowed by the Supreme Court as early as *Forgay* v. *Conrad*, 6 Howard 201, 205 when it was said that appealability should be allowed if the effect of an interlocutory order is such that if the order is immediately carried into execution the defendant "may be ruined before he is permitted to avail himself of the right" to appeal. An order sustaining a class action allegation clearly involves issues "fundamental to the further conduct of the case;" (see *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)); the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident. By this extension or interpretation of *Eisen I* the rule of finality would be given a "practical

taining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23.

After almost five years the case is before us again. While much of the delay is not attributable to further proceedings bearing on issues arising under amended Rule 23, a very considerable amount of the time of Judge Tyler and of the lawyers for the respective parties has, in this interval of five years, been devoted to hearings, the taking of depositions, and the preparation and filing of various District Court opinions, preceded by briefs and extensive oral arguments. Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. In the end Judge Tyler was persuaded that the innovations described by Judge Weinstein in his speeches[2] and in his series of opinions in *Dolgow* v. *Anderson*, 43 F.R.D. 21 (1967); 43 F.R.D. 472 (1968); 45 F.R.D. 470 (1968); 53 F.R.D. 661 (1971); 53 F.R.D. 664 (1971), were authorized by amended Rule 23. These innovations were the preliminary mini-hearing on the merits and the "fluid recovery," both of which will be fully described in due course. It is clear to

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rather than a technical construction," see *Cohen*, *supra*, 337 U.S. at 546; *Gillespie* v. *United States Steel Corp.*, *supra*, 379 U.S. at 152, and we would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations. (See *Swift & Company* v. *Compania Colombiana*, 339 U.S. 684 (1950); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507 (1950)).

2 Judge Weinstein's speech on this subject was reported in Weinstein, "The Class Action Is Not Abusive," New York Law Journal, May 1, 1972, p. 1, and May 2, 1972, p. 1.

us that, with or without these innovations, the notice provided by amended Rule 23 to be given "to all members (of the class) who can be identified through reasonable effort" cannot be given, as Eisen refuses to pay or put up any bond to cover this expense, and, if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose. We are also of the opinion that, on the basis of the new evidence now before us, the lawsuit is unmanageable as a class action, and that no preliminary mini-hearing on the merits and no "fluid recovery" procedures are authorized by the text or by any reasonable interpretation of amended Rule 23. Accordingly, we reverse and dismiss the case as a class action. We also vacate the findings of fact and conclusions of law that were made after the preliminary mini-hearing on the merits.

I

The Decision Below—52 F.R.D. 253 (1971)

In 1968, when the case was previously before us, it was estimated by someone that there were 3,750,000 members of the class, consisting of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. It was then doubtful whether any of the members of the class could be "identified through reasonable effort." Eisen's position then was and now is that, except possibly in the eventuality of the ultimate adoption of Judge Tyler's suggested plan which envisages payment by defendants of 90% of the cost of giving notice, he will not defray any of the expense of giving notice to any of the members of the class, nor will he post any bond to reimburse defendants for any of their disbursements, pursuant to any order of the District Court, made for the purpose of giving any notice.

It now appears that there are 6,000,000 members of the class and of these 2,250,000 can be easily identified.[3] Members of the class reside in every state of the United States and most foreign countries. They speak and understand a great variety of modern languages. The damages sought to be recovered were estimated at the time we last considered the case at something between a maximum of $60,000,000 and a minimum of $22,000,000.[4] Now the estimate has been raised by Eisen's counsel to 120 millions of dollars.

In our prior opinion we stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that "in this type of case" plaintiff must pay the expense of giving notice to these members of the class.[5] We further stated that if this

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3 According to the opinion below, the names and addresses of approximately 2,000,000 class members can be identified. In addition, another 100,000 or more had odd-lot transactions in stocks listed on the Exchange through what is called the "Monthly Investment Plan." These individuals can be identified through computer tapes in a manner similar to that used for locating the 2,000,000. Furthermore, another 150,000 or so public individuals had odd-lot transactions in stocks listed on the Exchange through "payroll deduction plans" operated by Merrill Lynch, Pierce, Fenner & Smith, Inc. Their names and addresses can be identified through the records of Merrill Lynch.

4 52 F.R.D. 253, 265 (S.D.N.Y. 1971).

5 We did not in our opinion in *Eisen II* intend our statement that "in such a case as this" plaintiff should defray the cost of notice to be dictum, as has been suggested, see *Berland* v. *Mack*, 48 F.R.D. 121, 131 (S.D.N.Y. 1969). This statement was part of our interpretation of amended Rule 23 as applied in this case, especially with respect to the actual individual notice required by subdivision 23(e)(2) to be given to those members of the class who could be identified. This was part of our instructions to conduct a hearing on the remand and decide whether the requirements of amended Rule 23 had been or could be met.

Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Ex-

could not be done there might be no other alternative than the dismissal of the case as a class action. For some reason not clear to us Judge Tyler disregarded these holdings and concluded that he had discretion, even with reference to those members of the class who could be easily identified, to provide for such notice as he thought to be reasonable in the light of the facts of this particular case.

Thus he directed actual notice only to "the approximately 2000 or more class members who had ten or more transactions during the relevant period" and to "5000 other class members selected at random" from the 2,500,000 class members who could easily be identified.[6] With respect to the rest of the 6,000,000 members of the class, Judge Tyler ordered what, without reciting all the details concerning the schedule of proposed publications, we consider to be a totally inadequate compliance with the notice requirements of amended Rule 23. One of the reasons for this

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change Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107.

6 Judge Tyler in discussing the notice problems observed that the plaintiff had also offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. This together with the individual notice to the 2000 class members with ten or more transactions and the 5000 selected at random, and the notice by publication, would in Judge Tyler's view "increase the likelihood of reaching a significant portion of the class," and would be in conformity with the requirements of due process.

was perhaps because Judge Tyler thought of these first notices, by mail and by publication, as merely the first of a series of notices. Judge Tyler then deferred the question of who should pay for this first round of notices until after a "brief" preliminary hearing on the merits. This is what is called the "mini-hearing." We shall have more to say later about this preliminary mini-hearing on the merits of Eisen's triple damage antitrust claim. Accordingly, the hearing was held "on the issue of the allocation of the costs of notice" and Judge Tyler concluded that the defendants must bear 90% of these expenses.

To describe Judge Tyler's general scheme as it slowly developed in the series of his many opinions[7] following the remand would be too tedious. The sum and substance of it was that he at last realized that it was highly improbable that any great number of claims would, for a variety of reasons, ultimately be filed by the 6,000,000 members of the class. No claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim. The average odd-lot differential on each transaction had been $5.18. The average individual class member engaging in five transactions would have paid a total odd-lot differential of $25.90. Assuming a 5% illegal overcharge the recovery is approximately $1.30, and when trebled the average class member would be entitled to damages of $3.90. As the costs of administration might run into the millions of dollars, it was not likely that a rush of claimants would eventuate no matter how extensive the publication. As he had surmised in the beginning, and as Chief Judge Lumbard stated in his dissent (*Eisen II*, p. 571), the class action was hopelessly unmanageable. So Judge Tyler tried to pull the case out of this morass by resorting to the "fluid recovery," which had been used as a vehicle for

7 Judge Tyler's opinions following the remand are reported at 50 F.R.D. 471, 52 F.R.D. 253, and 54 F.R.D. 565.

carrying out a voluntary settlement in the *Drug Cases, State of West Virginia* v. *Chas. Pfizer & Co., Inc., et al.*, 314 F.Supp. 710 (S.D.N.Y. 1970).[8]

The concept of this "fluid recovery" is very simple. Having decided that there is no conceivable way in which any substantial number of individual claimants can ever be paid, "the class as a whole" is substituted for the 6,000,000 claimants. Thus the first round of notices becomes relatively unimportant. The scheme adopted envisages the first round of notices as sufficient to get the ball rolling. Little is said about Step Two. This involves a trial of the case to a judge and jury on the merits—not a preliminary mini-trial this time, but a real full scale trial of the private triple damage antitrust case. In some way the damages to "the class as a whole" will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the "gross damages" to "the class as a whole." With the money in hand, the case begins to resemble the *Transitron* and *Drug Cases* and from then on we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration. As "the class as a whole" will include all those who had purchased or sold in the period from mid-1962 to mid-1966 and all those who, at the time of assessing the full damages, were presently purchasing or selling, and those who might in the future purchase and sell, securities in lots of less than 100 shares, it is quite apparent that some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and

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8 Judge Wyatt's approval of the settlement was affirmed by this Court at 440 F.2d 1079 (1971).

many other new traders, who had no transactions in the period from mid-1962 to mid-1966, will receive some payments. According to Judge Tyler, at least those members of the original class of 6,000,000 who "have maintained their odd-lot activity, will reap the benefits of any recovery" (52 F.R.D. at p. 265). As far as we are aware there has never been, nor can there ever be, a reliable or even rational estimate of how many traders, whether speculators or investors, can be said to be expected to continue as such after the lapse of 10 years or so. As it is suspected that relatively few claims will be filed and the damages assessed are supposed to cover the losses of "the class as a whole," there will be a huge residue, similar to the amounts paid to various charities "to advance public health projects" in the *Drug Cases,* and this residue is to be used for the benefit of all odd-lot traders by reducing the odd-lot differential "in an amount determined reasonable by the court until such time as the fund is depleted." 52 F.R.D. at p. 265. We are at a loss to understand how this is to be done, but it is suggested that it "might properly be done under SEC supervision or at least with SEC approval."

Despite its early expression of doubt on the subject,[9] and what appears at least to be *de facto* exercise of supervisory powers over Rules or practices on the subject of the amount and uniformity of the rate of commissions on

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9 According to the Report of the Special Study of Securities Markets, Vol. I, p. 182 (1963), an attorney representing the odd-lot firms presented a proposal for an increased differential. The Director of the Division of Trading and Exchange expressed some doubt as to the Securities and Exchange Commission's jurisdiction over the matter. The Report states that "(t)he Commission declined to decide the jurisdictional question but stated that it had no objection to the proposal. It is to be noted that neither the Exchange nor the Commission asserted jurisdiction, the former denying its jurisdiction and the latter expressing doubts, yet each informally acquiesced in the increase." See also p. 200 of the Report.

odd-lot purchases and sales, the SEC finally did exercise such powers[10] and we hold that at all times the SEC possessed such powers under Sections 11(b)[11] and 19(b)[12] of the Securities Exchange Act of 1934. No District Court has authority to decide upon the rate of such commissions to take effect until the exhaustion of any residual fund left over by application of a "fluid recovery" in a private triple damage antitrust case, after the payment of claims in a class action or otherwise. The courts may review rulings of the SEC, but they have no more power than the District Court to fix any such rates in the first place or to give directions to the SEC concerning the fixing of such rates or the time within which such rates are to be effective, as part of a judgment in a private triple damage antitrust case.

II

Disposition of Certain Contentions of the Parties

Solely for the purpose of making our holdings clear in this difficult and complicated case we think it proper first to dispose of certain contentions of the parties.

A

We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to

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10 At the preliminary hearing defendants' Exhibit C contained a letter from the SEC to the New York Stock Exchange dated June 16, 1966. In part the letter stated that the "Commission hereby makes written request pursuant to section 19(b) of the Securities Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of odd-lot purchases and sales, and the fixing of reasonable rates of commission and other changes in connection therewith, to fix odd-lot differentials * * *."

11 15 U.S.C., Section 78k(b).

12 15 U.S.C., Section 78s(b).

side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. See *In Re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 281-2 (S.D.N.Y. 1971).

B

Moreover, we think the three cases cited by Judge Tyler as "respectable precedent" for fluid class recovery are all distinguishable. These three cases are: *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); the *Drug Cases*, 314 F.Supp. 710 (S.D.N.Y.), aff'd 440 F.2d 1079 (2d Cir. 1971); and *Daar* v. *Yellow Cab Company*, 67 Cal.2d 695, 64 Cal. Rptr. 724, 433 P.2d 732 (1967).

Judge Wyatt's extraordinary feat of judicial administration in carrying out the terms of the one hundred million dollar settlement in the *Drug Cases* deserves all the praise it has received. But it was a consensual affair made possible by the agreement of the parties and without objection to the assumption by the District Court of jurisdiction to accept and administer the fund. Here we have no fund. There is no settlement. Every issue is contested and liti-

gated. And authority to permit this action to proceed as a class action must be found within the four corners of amended Rule 23, as interpreted in the Reviser's Note. Applying this test we hold Eisen's class action must be dismissed. *Bebchick* was not a class action in any sense of the word. Amended Rule 23 was not involved. In the exercise of its powers of review, the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court approving the action of the Public Utilities Commission of the District of Columbia supporting a fare increase by the transit company. In the meantime, the additional cash fares, now found to be illegal, had been collected. There was no way to direct refunds as those who paid these cash fares could not be identified. So, also in the exercise of its powers of review the Court of Appeals directed the amount of these additional cash fares to be set up in the books of the transit company to be used, in the discretion of the regulatory commission "to benefit bus riders as a class in pending or future rate proceedings." We cannot find that this case has any bearing on any of the issues in this amended Rule 23 case. Finally, *Daar* was a case arising under a state class action statute very different in its phraseology from amended Rule 23. The ruling was made on a demurrer to the complaint so the approach to the legal issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met. Moreover, the court was evidently of the view that the individuals who had been damaged by the alleged overcharge in taxi fares would ultimately have to prove their separate and individual damages. 433 P.2d at 740.

For the reasons stated in this opinion we disagree with the holding in the *Dolgow* cases.

C

The Merits of Eisen's Triple Damage Antitrust Claim

The defendants by extensive and even cogent arguments have urged us not only to vacate Judge Tyler's findings and conclusions on the merits of the case but to decide that there is no merit in Eisen's antitrust claim. Thus the defendants argue that in the context of an antitrust suit brought against defendants acting within a self-regulatory industry the *per se* rule of antitrust liability is inapplicable, and that even under a rule of reason the practices of the odd-lot defendants and the Exchange were not violative of the antitrust laws. In essence the defendants contend that Judge Tyler incorrectly applied the *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) doctrine, and should have concluded that the fixing of the odd-lot differential is necessary to the proper implementation of the Securities Act. Also the defendants assert that the Securities and Exchange Commission has primary jurisdiction over the substantive issues presented in this litigation. As already appears in this opinion, we hold and decide that the SEC does possess supervisory powers over the amount and uniformity of the commissions to be paid on odd-lot purchases and sales. But this is only part of the picture. There are many facets to this complicated case. We feel it is proper for us to say only that the record before us constitutes no proper basis for any decision of the merits, tentative or otherwise.

III

Controlling Principles

When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought.

But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, clichés and rhetorical devices generally miss the mark. Something more substantial is necessary to establish a base for the proper decision of difficult and complex questions of law. One reason for this is that the solution is found more often than not by the application of fundamentally simple principles.

Thus statements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and

salutary protections against oppressions,[13] including oppressions by those whose intentions may be above reproach.

We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that "such rules shall not abridge, enlarge or modify any substantive right." [14]

The applicable substantive law is Section 4 of the Clayton Act[15] that authorized the private triple-damage antitrust suit to recover damages by a person who has been "injured in his business or property" by reason of a violation of the antitrust laws. That the claims of many may not be treated collectively or as "the class as a whole" is what the Supreme Court decided in *Snyder* v. *Harris*, 394 U.S. 332 (1969), where plaintiff, in a diversity case sued as representative of a class of some 4000 shareholders of an insur-

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13 The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." (*Burdeau* v. *McDowell*, 256 U.S. 465, 477 (1921) (dissenting opinion)). Justice Frankfurter also remarked that "(f)airness of procedure is 'due process in the primary sense * * *.' It is ingrained in our national traditions." (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 161 (1951) (concurring opinion)).

14 28 U.S.C., Section 2072.

15 15 U.S.C., Section 15.

ance company. Her individual claim was for less than $10,000. She was not permitted to aggregate her claim with the separate claims of the other members of the class which amounted to $1,200,000. Despite the fact that amended Rule 23 was already in effect, the case was dismissed. Moreover, in the recent case of *Hawaii* v. *Standard Oil Co. of California, et al.*, 405 U.S. 251 (1972),[16] it was again held that only persons actually injured in their business or property could claim damages under the Clayton Act.

Eisen also alleges that the Exchange is liable for its failure to regulate the odd-lot differential as required by Section 6 of the Securities Exchange Act. He argues that Section 6, 15 U.S.C., Section 78f, requires the securities exchanges to prescribe rules and regulations for the regulation of the industry. Failure so to regulate allegedly subjects the defendant-Exchange to liability to those who have suffered injury due to the abdication of this regulatory responsibility. The duty to regulate emanates from the Exchange Act, but the right of an injured party to recover damages is, according to Eisen, based upon federal common law, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944). Thus, if Eisen is correct and Section 6 of the Act creates a statutory duty on the Exchange to protect members of plaintiff's class, then these members "may sue for injuries resulting from its breach and (the) common law will supply a remedy if the statute gives none," *Baird* v. *Franklin*, 141 F.2d at 245.

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16 The District Court in *Hawaii* v. *Standard Oil Co.*, 301 F.Supp. 982 (D.Hawaii, 1969) dismissed the class action allegation on the ground that "under the circumstances * * *, the class action based upon the injury to every individual purchaser of gasoline in the State, * * * in the context of the pleadings, would be unmanageable." Hawaii, however, decided not to appeal this ruling to the Ninth Circuit, and, of course, the ruling was not before the Supreme Court for review in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 256, n.6 (1972).

The fundamental doctrine that permeates our opinion in *Eisen II*, and which we are now about to apply again in this same case, is whether the requirements of amended Rule 23 have been met. We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo*.

So, we shall proceed to examine in some detail the provisions of amended Rule 23 in the light of the long and explicit Advisory Committee's Note, 39 F.R.D. 98, and decide whether or not Judge Tyler has followed our directions to appraise and to apply each of the factors enumerated on the face of the Rule. In the light of our conclusions with respect to notice and manageability, we do not reach the subject of adequate representation.

IV

Lack of Individual Notice to "All Members Who Can be Identified Through Reasonable Effort"

Our prior ruling in *Eisen II* is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23(c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F.R.D. 106-7): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *." [17] While Judge Tyler seems

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17 The *Drug Cases*, *supra*, 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971), contain nothing that gives support to Judge

to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statement that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action.

V

The Preliminary Mini-Hearing on the Merits Was Not Authorized by Amended Rule 23 and the District Court Had No Jurisdiction or Competence to Hold Such a Hearing

The Federal Rules of Civil Procedure set forth a considerable variety of procedural devices designed for the disposition of cases on the merits. There may be traditional trials to a judge or to a judge and jury; there may be summary judgments, dismissals with or without prejudice for failure to state a claim and so on. But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift

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Tyler's ruling that individual notice to a limited number of members of a group of 2,250,000 whose names and addresses were identified was sufficient compliance with the notice requirements of amended Rule 23. An examination of the briefs in the *Drug Cases* makes it clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient. Moreover, as appellant in the *Drug Cases* attacked the sufficiency of the notice to the members of the wholesaler-retailer class, this Court rejected this argument, observing that individual notice was sent by mail to each and every member of this class whose name was available. 440 F.2d at 1091.

determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

We agree with the ruling by the Fifth Circuit in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971), that the preliminary hearing on the merits was improper. As stated by Judge Wisdom, 452 F.2d at page 427:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

This was the first time, as far as we are aware, that any Court of Appeals has passed on the point. As noted by Judge Wisdom in footnote 5 on page 429 of 452 F.2d, this Court did not have occasion to rule on the question when it decided the appeal from Judge Weinstein's summary judgment for defendants in *Dolgow*, 438 F.2d 825 (2d Cir., 1971). While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing on the merits that had been conducted by Judge Weinstein. Nor was that question before this Court in *Green* v. *Wolf Corporation*, 406 F.2d 291 (1968). See footnote 15 on pages 301-2.

Of the few District Court decisions on the point most of these disagree, as, of course, does the Fifth Circuit, with the innovations described in *Dolgow*,[18] and there is little to commend the reasoning or lack of reasoning in the others.[19] No provision is made in amended Rule 23 for any such mini, preliminary or other hearing on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.

Moreover, in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

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18 Decisions which have rejected the use of a preliminary hearing on the merits to decide the propriety of litigation proceeding as a class action include: *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), cert. denied 398 U.S. 950 (1970); *Katz* v. *Carte Blanche Corp.*, 52 F.R.D. 510 (W.D.Pa. 1971); *Fogel* v. *Wolfgang*, 47 F.R.D. 213 (S.D.N.Y. 1969); *Cannon* v. *Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969); *Mersay* v. *First Republic Corp. of America*, 43 F.R.D. 465 (S.D. N.Y. 1968). Judge Mansfield took the opportunity in *Berland* v. *Mack*, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) to comment on the preliminary hearing on the merits: "The suggestion that such abuse of the corporate treasury can be avoided by a preliminary hearing to determine the merits of the claim is illusory. Quite aside from the additional burden that it heaps upon the Court, it would be a rare case where the Court could assure the class of ultimate success even after a preliminary hearing."

19 Cases supporting a preliminary hearing on the merits are *Milberg* v. *Western Pacific Railroad Co.*, 51 F.R.D. 280 (S.D.N.Y. 1970), appeal dismissed, 443 F.2d 1301 (2d Cir. 1971), and, of course, *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

VI

As a Class Action the Case Is Unmanageable

From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action. It turns out that he was right. As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures. The fact that the cost of obtaining proofs of claim by individual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action. Other cases involving millions of diverse and unidentifiable members of an alleged class had been dismissed as unmanageable or altered in composition.[20] And so even *Eisen* and his counsel conceded that

20 See, *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *United Egg Products* v. *Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970); *Hackett* v. *General Host Corp.*, Civil No. 70-364 (E.D.Pa. 1970), appeal dismissed, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 461 (E.D.Pa. 1968); *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F.Supp. 1001 (E.D.Pa. 1967).

the class was not manageable unless the "fluid recovery" procedures were adopted.

Thus, in the language of Eisen's counsel:

> There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both Cherner v. Transitron Electronic Corporation, 201 F.Supp. 934 (D. Mass. 1962) and Illinois Bell Telephone Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939). (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar.

Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce.[21] And, when it comes to the filing and processing of claims, lawyers specializing in class actions have stated that the only effective way to induce any reasonable number of members of the class to file claims is to conduct full-scale campaigns on TV and radio, solicit appearances by advocates of consumers' rights such as Ralph Nader, letters from Congressmen to their constituents, public statements by various state attorneys general "and coverage in various news media, union newsletters and the like," also to persuade the Federal Communications Commission

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21 Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). But in *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962) the Court refined the *Mullane* rule: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

to classify announcements of this character as "public service announcements." [22]

All the difficulties of management are supposed to disappear once the "fluid recovery" procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing.[23] We referred to this possibility in our opinion in *Eisen II* at pages 567 and 570.

But if the "class as a whole" is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of "the class as a whole."

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22 These suggestions were made and discussed in Shapiro, "Consumer Participation in Antitrust Class Action Part II", New York Law Journal, May 31, 1972, p. 1.

23 The recent draft for the *Manual for Complex Litigation* suggests that problems of administering the class action should not justify denial of an appropriate class action request "except when the attention and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled." (p. 36). Due to our rejection of the fluid class recovery concept, we are compelled to conclude that this litigation falls squarely within this exception contemplated in the Manual. The administrative problems posed by this action will frustrate any effort to provide the individual class members with compensation for the alleged injuries.

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

VII

A Few General Observations

Perhaps in part due to the liberal views on the subject of amended Rule 23, as expressed in our opinion in *Eisen II*, and doubtless stimulated by the counsel fees allowed in the *Transitron* and the *Drug Cases*, where large voluntary settlements had been approved and administered by District Judges, there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches, that the task of even attempting to enumerate all of these for purposes of documentation is too much for us.

Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought "on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and

even all people in the United States." [24] So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.[25]

The *"in terrorem"* effects of the innovations described in *Dolgow* have been highly praised by those who invented or applied them.[26] But Professor Milton Handler, whose Annual Antitrust Review has for many years brought his expertise in Trade Regulation and, we are happy to say, some entertainment to the members of the Association of the Bar of the City of New York, and to the members of the Bench and Bar in general, minces no words. He calls these procedures "legalized blackmail." [27] There is reason

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24 In the Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23 of the Federal Rules of Civil Procedure, issued March 15, 1972, this quotation appears on p. 6 with supporting citations.

25 *Id.*, at 16. See also, *Morris* v. *Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

26 See, *Dolgow* v. *Anderson*, 43 F.R.D. 472, 487 (E.D.N.Y. 1968); Miller, *Problem In Administering Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 508; Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Lawyer 1259 (1970).

27 Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). See also, Professor Handler's 24th Annual Antitrust Review, 72 Colum. L. Rev. 1, 34-42, in which he criticizes the fluid

to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.

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recovery procedure as sought to be applied in "class" actions. There are some additional trenchant comments in his 25th Annual Antitrust Review, published in the December, 1972 issue of The Record of the Association of the Bar of the City of New York, pp. 660 ff.

Another possibility, suggested by the Report and Recommendations of the Special Committee of the American College of Trial Lawyers, is a further amendment to amended Rule 23 consisting of a new subdivision providing:

> In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more effectively served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of (b)(3).

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney's fees in such cases should also provide adequate incentive to counsel for the representative or representatives of the class.[28]

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28 In his recent book FEDERAL JURISDICTION: A GENERAL VIEW, containing his 1972 Columbia University James S. Carpentier Lectures, Chief Judge Friendly makes this comment on class actions pursuant to amended Rule 23, at page 120, omitting footnotes:

> Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.

Conclusion

For the reasons stated in this opinion the findings and conclusions following the mini-hearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

HAYS, *Circuit Judge*, concurring in the result:

I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 per cent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure.

Court of Appeals Opinion 5/24/73 on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. 341—September Term, 1972.

(Filed May 14, 1973 Decided May 24, 1973.)

Docket No. 72-1521

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Chief Judge

KAUFMAN, Circuit Judge, with whom Judges FRIENDLY, FEINBERG, MANSFIELD, and MULLIGAN, concur.

I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. Judge Oakes's opinion, dissenting from the denial of en banc, illustrates some of the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future. En banc consideration by this court, however, would merely serve as an instrument of delay. Moreover, the application for certiorari will not go to the Supreme Court barren of the views of the judges of this court as, for example, in the Pentagon Papers case, where the court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position. Our decision to decline en banc consideration of this case in no way implies, as my brother Oakes suggests, the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead, we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

Concurring Opinion of Judge Mansfield
Dissent of Judge Hays
Dissenting Opinion of Judge Oakes

MANSFIELD, *Circuit Judge:*

I concur in Judge Kaufman's opinion.

The issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible. If the recent history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court. See, e.g., *Rodriguez* v. *McGinnis,* 456 F.2d 79 (2d Cir. 1972), *reversed sub nom. Preiser* v. *Rodriguez,* 41 U.S.L.W. 4555 (May 7, 1973). In the meantime one year's delay would be added to this already protracted proceeding. This predicament might be avoided by granting the petition and, with the case then before us *de novo,* invoking the Supreme Court's jurisdiction through the rarely used procedure provided by 28 U.S.C. §1254(3), which empowers us *sua sponte* to certify grave questions to it for final decision where we believe the answers to be in doubt. See 28 U.S.C. Rules 28-29, Revised Rules of the Supreme Court (1973 Supp.); *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 728-29 (1929). However, since I am persuaded that the Supreme Court, in view of the far-reaching significance of the issues, will in all likelihood grant certiorari, I believe that such a procedure is unnecessary. Otherwise I would agree with Judge Oakes' forceful plea for an *en banc* hearing.

HAYS, *Circuit Judge,* dissenting:

I believe that this case should be reconsidered en banc.

OAKES, *Circuit Judge* (dissenting from the denial of rehearing en banc), with whom Judge Timbers concurs:

For this court not to hear a matter of this significance is to render the en banc statute[1] a nullity. One may in this era of burgeoning appellate business quite plausibly take the view that the en banc procedure should not be used "merely" to correct individual injustices[2] or mistakes, but only in a case where the panel decision[3] is in serious conflict with prior decisions of the particular Circuit Court of Appeals or where it is of extreme importance. Even with that view, however, this case, if no other decided in recent years, qualifies for en banc treatment. I say this for the following reasons which I will enumerate, adding a few comments subsequently:

1. The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens.

2. The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23.

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1 Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

28 U.S.C. § 46(c).

2 Occasionally a vote to rehear a panel opinion en banc has been effective in the administration of individual justice. *See United States ex rel. Whitmore v. Malcolm*, No. 72-1706 (2d Cir., Jan. 22, 1973), slip op. at 1615 (2-1 decision), where following this court's vote to rehear en banc a panel opinion affirming a denial of habeas corpus and with the rehearing en banc pending before us, the State prosecutor dismissed the case against the appellant, thereby mooting the appeal.

3 I speak of a panel decision as one by three judges sitting on a Court of Appeals.

3. The case should be heard en banc; the procedure is there and presumably is to serve some purpose, and the Supreme Court has admonished the Courts of Appeal to make use of it.

4. There are no compelling reasons for not hearing the case en banc.

The Case Is of Extreme Importance; It Vitally Affects Class Actions.

I would expect that the case would be conceded by each and every one of the judges voting to deny en banc treatment, if he were polled, to be of extreme importance. Judge Kauman's opinion makes this concession.

The panel opinion defines as unmanageable any case involving a large class where actual notification of readily ascertainable members is expensive. It calls notice by publication to a large class a "farce" and casts constitutional doubts on any other construction of Rule 23. The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts.[4] The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items

4 I say "little people" because bigger investors don't generally deal in odd lots. They prefer to avoid the price differential in brokerage fees dealing in lots of 100 or more. It is interesting to contrast this case with *Lanza* v. *Drexel*, No. 35794 (2d Cir., Apr. 26, 1973), slip op. at 3033 (en banc), where this court did en banc and reverse a panel ruling that had a bearing, although in quite a limited factual situation in my opinion, on the liability for Securities Act violations of directors unconnected with management but highly involved financially. The panel opinion's decision here was partially reached in the name of fairness to defendants who thereby may retain, if the plaintiff's allegations are proven, profits obtained by violation of the antitrust laws. As I compute the cost of mailing readily identifiable members of the class from Judge Tyler's opinion, it was just over ten cents apiece or $218,750. 52 F.R.D. at 263.

selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance.

The Panel Opinion Reaches a Very Doubtful Result.

To vote in favor of rehearing a case en banc should not necessarily mean that the judge is thereby committed to overturn the panel opinion as Judge Timbers pointed out dissenting from the denial of rehearing en banc in *Zahn* v. *International Paper Co.*, 469 F.2d 1033 (2d Cir.), *rehearing en banc denied*, 469 F.2d 1033, 1041, n.1 (2d Cir. 1972) (dissenting opinion of Timbers, *J.*, joined by Oakes, *J.*), *cert. granted*, 41 U.S.L.W. 3441 (U.S., Feb. 20, 1973) (No. 72-888). At the same time, if one agrees fully with the panel decision one does not generally vote to hear it en banc. I take the view that it is only when there is reasonable doubt on a point, or the question or questions are unresolved in the judge's mind, that he should vote for en banc, and then only in unusual or extremely important cases, or cases which conflict with prior decisions of this circuit or the Supreme Court.

Serious questions about the panel's conclusions as to the management of class actions exist. Class actions, I had thought, were "an invention of equity . . . mothered by the practical necessity" of providing a practical procedure to enable large numbers of litigants to enforce their common rights. *Montgomery Ward & Co.* v. *Langer*,

168 F.2d 182, 187 (8th Cir. 1948). *See* C. Wright, Federal Courts 306 (2d ed. 1970); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 375 *et seq.* (1967). The panel's decision seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to Fed. R. Civ. P. 23.

The panel opinion is at the very least highly debatable on its face since it requires, without even considering division of a large class into a much smaller subclass under Rule 23(c)(4)(B), an individual plaintiff to pay the cost of actual notice to the identifiable members of the entire class which he seeks to represent and since it declares—I may add without any support or citation of authority whatsoever other than judicial fiat—that "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." Slip op. at 3239.

The view of *Eisen II*, 391 F.2d 555 (1968), that Rule 23(c)(2) requires individual notice to all members of Eisen's class who can be identified through "reasonable effort" has been criticized as "unnecessarily restrictive . . . ." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 at 148 (1972); *see also* Kaplan, *supra*, 81 Harv. L. Rev. at 396; Comment, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969). Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice to those 2,000,000 or so "easily identifiable individuals" similarly situated, *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253, 257 (S.D.N.Y. 1971), should not necessarily terminate the class action character of this suit. It may be appropriate, as Judge

Tyler suggested below, to charge the defendants with a portion of the notification costs. *See Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968) (Weinstein, *J.*); C. Wright, *supra* at 313-14. But even if these two questions were decided against the plaintiff, an en banc decision drawing sustenance from the flexible, still developing Rule 23 jurisprudence might embrace one of several other alternatives to the panel's burial of larger-number plaintiff class actions. These include the alternatives suggested by Judge Weinstein and others discarded in the panel opinion. But there are others, too.

The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. *See* Kaplan, *supra*, 81 Harv. L. Rev. at 390-91; Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 438-54 (1960).

The problem of individualized notice under Rule 23 (c)(2) is so important to the future of class actions and the panel's resolution of it seems so inconsistent with the spirit of Rule 23, in short, that consideration by the full court seems essential.

At least as questionable is the panel's conclusion that this class action is unmanageable and should be dismissed because "no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class." Slip op. at 3238. The panel seems to intimate in a footnote that individualized notice to all 6,000,000 members of the class borders on being a constitutional requirement. Slip op. at 3239, n.21. This intimation seems to me to be pro-

foundly incorrect. In my view notice to class members who cannot be identified is not a constitutional requirement and not a prerequisite to a manageable class action. All that the due process clause requires is a procedure that "fairly insures the protection of the absent parties who are to be bound by [the judgment]." *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940) (not cited by panel decision). *See Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1950); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1960). *See also* C. Wright, *supra* at 313; Kaplan, *supra*, 81 Harv. L. Rev. at 391-92. *But cf. Eisen II*, 391 F.2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U.S.C.A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. *Mullane* v. *Central Hanover Bank and Trust Co., supra*, 339 U.S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation —the *Wall Street Journal, Business Week, Barron's,* the *New York Times* financial section, and the like—would reach most of the class.

To say, as the panel opinion says, slip op. at 3239, that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce," and to say it without any supporting data or authority, strikes me as, in the words of the panel opinion, a "rhetorical device," slip op. at 3231. In this day and age of communications, why are such notices a "farce"? It

may be that most people will not heed them—the sums may be too small to bother with, for example—but does this make the notices farcical? Probate notices published in small-town newspapers around the country are treated as notice to the whole world of possible creditors and heirs that an estate is being closed, and they are pretty effective for this purpose. Notice by publication of actions such as this in key, spot places can be, I should think, highly effective. If notice in the "Drug Cases," *State of West Virginia* v. *Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Charles Pfizer & Co.*, 404 U.S. 871 (1971), could work reasonably well, why can't it work with a somewhat more sophisticated group of consumers, odd lot buyers? Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.

The panel opinion's suggestion, slip op. at 3243, that it should "be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer" is in my view an abdication of judicial responsibility. It is as much as to say that the courts are insufficiently inventive to be capable of handling a matter—the distribution of unlawfully obtained money to a large number of people. I doubt this very much. I suspect that the courts can do the job.

All in all, it seems to me that the panel's decision not merely ossifies, but destroys, the development of what was becoming an important procedural device for the airing of grievances where large numbers of people were affected and one individual did not have the resources to pursue his own legal rights to conclusion. At the very least the

panel opinion should not be allowed to stand without full and complete consideration by the full active bench of this circuit, aided as we would be by the consultation and vote of the two distinguished senior judges who sat on the panel in question.

The Case Should Be Heard En Banc.

One can argue, as many wiser minds than the writer's have argued, that a court of appeals should never use the en banc procedure. The Learned Hand court was apparently able never to sit en banc. *See generally* M. Schick, Learned Hand's Court 105-06, 116-22 (1970). But this was before the number of judges on the court was expanded to meet the court's burgeoning business. In other words, it was when the court and its business were small enough to enable a good deal more consultation before adjudication among the judges on the court than now does or can occur. Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court. If panel decisions absent an en banc procedure were to be binding on the other members of the court (as with an en banc procedure this court has always treated them in the past), there would be (A) an even greater burden on the Supreme Court than it now has to correct egregious error or to examine important cases and (B) an individual active circuit court judge's vote would count, at least in the Second Circuit, in only the 160-220 cases per year on which he sits and be of no significance whatever in the remaining 1,000± cases[5] coming before the court.

5 For fiscal year 1972, an unusually light year in this circuit, there were a total of 1,317 filings and 177 appeals terminated without decision. 1973's figures indicate that about 1,200 cases will come before the court.

In the event this court's tradition were to be broken and an individual panel's determination were *not* to be binding on the rest of the court, the Supreme Court's burden would be equally great and this court would be even more fragmented. Its decisions would merit only the support that the persuasiveness of the individual opinion writer or the prestige of the particular panel could muster. There would be no "law of the circuit" as such. The district judges and others who look to the Court of Appeals for guidance in their decision-making would find none.

Thus it seems to me that the en banc procedure, or some viable substitute for it, is essential to ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals. The en banc power has received the imprimatur of an 8-1 Supreme Court, in a case that is still law, as "a necessary and useful power—indeed too [sic] useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 260 (1953). There are those of us, I suspect, who think the exercise of that power is one alternative preferable to the controversial national court of appeals which is receiving considerable attention these days.

The only viable alternative to the en banc procedure, if there is to be any genuine "court" position on a given case, is the prepublication circulation of all opinions for comment which is done in some circuits. This would be somewhat helpful but has the disadvantages of being advisory only, unless the en banc procedure is invoked; it also creates some work under the pressure of time deadlines additional to that which the en banc procedure permits. Prior circulation in seemingly important cases which is done in this circuit fairly frequently, with I think good result, but was not done in this particular case, has some merit, too; at

least it may alert the whole court to an important case or the opinion writer or panel to some serious questions. Here even this alternative has been unavailable.

There Is No Good Reason for Not Hearing This Case En Banc.

There is no real pressure of time (the lapse of time since *Eisen II* is five years; the Supreme Court is unlikely to examine the inevitable petition for a writ of certiorari until four or five months from now),[6] that would, as to some extent it did in the Pentagon Papers case,[7] make en banc rehearing or opinion writing unfeasible. There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such.

It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it, than what is now the Second's, before it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.

I believe in short that our duty is to hear this case en banc. Since the panel opinion sounds the "death knell," *see Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), for consumer and environmental class actions, the omission to do so is to my

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6 We are told that the average en banc proceeding takes about 155 days. This is not really necessary in my view but in this case would not be too harmful.

7 *United States* v. *New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971).

mind grievous. Perhaps, however, it will serve as a vehicle for a higher authority to tell us whether the admonitions of *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co., supra,* relative to the en banc procedure still have any meaning. If they do not, the world may not come to an end, but we will be an interesting court to watch as our eight active and six senior and numerous visiting and district judges go from decision to decision, guided 2 per cent[8] of the time by a grant of certiorari. We will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was.

8 From information furnished by the Circuit Executive of our court, in fiscal year 1972 there were 369 petitions for certiorari from the Second Circuit filed and only 18 granted. In fiscal year 1973, 284 petitions have been filed and only 12 granted. If in forma pauperis petitions are included as cases heard by our court, the percentage of certiorari grants is closer to 1.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself
and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,
Appellant

(D. C. Civil Action No. 69-1326)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 1, 1973

Before SEITZ, *Chief Judge*, ALDISERT, *Circuit Judge* and
FISHER, *District Judge*

Cloyd R. Mellott
John H. Morgan
Robert W. Doty
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OPINION OF THE COURT

(Filed May 22, 1973)

SEITZ, *Chief Judge*.

On this appeal,[1] defendant contends the district court erroneously granted plaintiff's pretrial motion to allow his suit to proceed as a class action pursuant to Fed. R. Civ. P. 23. Defendant asks us to reverse that determination and permit plaintiff to proceed only on his own behalf.

Defendant Carte Blanche Corporation is a national credit card company. Members must pay an annual membership fee and, in return, have the privilege of charging items at the company's associated establishments. As part of its billing procedures, defendant levies certain service charges and late fees. Plaintiff attacks the defendant's disclosure of its charges, and its membership fee as a component thereof, under the civil damage provisions of the Truth-in-Lending Act.[2] 15 U.S.C. §§1601, 1640 (1971). Under the Act, anyone injured by a violation of its provisions is entitled to recover twice the amount of his damages, but not less than $100 nor more than $1,000 per plaintiff, plus reasonable attorney's fees.

The instant problem arises from an individual plaintiff's assertion of the right to at least minimum recovery for each of a potential class of 800,000 similarly situated members of Carte Blanche Corporation. Defendant claims Congress did not intend class enforcement of the minimum penalty provisions of this Act; in the alternative, it contends the class is unmanageable under Rule 23. The district court concluded that while the issues were difficult, pretrial doubts should be resolved in favor of allowing the class action.

The two issues presented for resolution at this juncture

1. This appeal is an interlocutory appeal granted pursuant to 28 U.S.C. §1292(b) (1971), after certification by the district court.

2. Hereinafter cited as Act.

are: (1) the standard to be applied by this court in reviewing the district court's pretrial grant of the class action; and (2) under that standard, whether the district court erred in granting the motion. Subsumed into the latter issue is the question of whether Congress intended to bar any class enforcement of the provisions of this Act.

I. THE APPLICABLE STANDARD OF REVIEW.

Rule 23(c)(1) mandates that the district court determine as soon as practicable after commencement of a suit whether a class action is to be allowed. However, the district court retains discretion to modify that determination at any time before a final decision on the merits. This includes the discretion to decide later that class status was improperly granted and to dismiss that element of the proceeding. Thus, although the initial determination must be made without benefit of actual litigation of the case, the district court may modify its initial judgment after watching the litigation unfold. If it subsequently decides that its initial impression was erroneous, it can take appropriate action to remedy the error.

The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appellate review of that order has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only then will this court intercede. *Cf. Interpace Corp. v. City of Philadelphia*, 438 F.2d 401 (3d Cir. 1972)(mandamus).

Four factors militate in favor of this standard. First, the district court has considered whether, in addition to

the other criteria imposed under Rule 23, the class is manageable. Since this involves a determination by the district court as to a litigation over which it will be presiding, this court should give great deference to that decision. Second, as previously discussed, the district court may itself review and modify or reverse its initial, pretrial determination throughout the pendency of the proceeding. This second point buttresses the policy of giving great deference to the district court's pretrial grant. Third, because of this continuing power of review and because of the procedural setting when the initial decision is made, the district court should generally resolve all doubts in favor of allowing the class. Thus, in challenging the pretrial grant, more than reasonable doubt as to the propriety of initially allowing the class must be shown. Fourth, there is no right to interlocutory appeal. This last factor, like the first and third, is reinforced by the presence of the second factor: the power of continuing self-review vested in the district court.

Therefore, where, as here, interlocutory review of the district court's initial grant of Rule 23 status has been permitted, there should be a high threshold for appellate intervention. We believe our decision to require clear and convincing evidence of an abuse of discretion is manifestly warranted in these circumstances.

II. APPLICATION OF THE STANDARD OF REVIEW.

As previously stated, the district court allowed this suit to proceed as a class action. In so doing, it properly resolved all doubts which it had at this initial stage as to the manageability of the class in favor of its allowance. Although defendant launches a broad scale attack upon the district court's determinations on the Rule 23 issues, the primary contention ripe for disposition in this appeal is defendant's claim that in fact the class is unmanageable. Two criteria set out in Rule 23(a) and (b) are crucial to a resolution of this issue: (1) whether the class is too

numerous to handle in one action; and (2) whether common questions of law and/or fact predominate among the class members.

Defendant contends common questions of law or fact do not predominate among this class of potentially 800,000 members. Since the Act is expressly inapplicable to business- or commercially-related transactions, it claims each person purportedly a member of the class would have to be cross-examined as to whether he used his card for consumer credit purchases. Additionally, it argues it would have to bring counterclaims under Rule 13(a) for past due debts of some twelve million dollars against purported members of the class. Defendant asserts these complications, when coupled with the sheer size of the potential class, render this class presumptively unmanageable.

We do not find defendant's arguments persuasive at this juncture. Since the Act covers only consumer credit transactions, definitionally, only those who suffered injury in such transaction are members of the class. Whether any individual used his card for business or personal purposes does not go to the validity of the class or its claim. Rather, it goes to proof of membership in the class. The failure to ascertain the bona fides of each purported claimant's membership will not affect the interim class adjudication on legal liability, except perhaps as to selecting a class representative who will adequately and fairly protect its interests [Rule 23(a)(3) & (4)].[3] Only after a determination has been made that defendant in fact is liable under the terms of the Act will the bona fide nature of each purported claim have to be resolved. Thus, at least for the purpose of adjudicating the controlling legal issue, the class is not per se unmanageable.

Our conclusion on this point is reinforced by the

3. Of course, purported members of the class would have to receive notice of the pendency of the proceedings under Rule 23(c)(2).

structure of Rule 23. Merely because the district court has decided to litigate one issue of this suit in a class action does not freeze it into disposing of the remaining issues through this procedural vehicle. Indeed, class proceedings may well be inappropriate for litigating these issues; the district court legitimately could conclude that class litigation would not prove the superior and most efficient method of adjudicating these subsidiary controversies. However, because of Rule 23(c)(4)(A), these potentialities do not affect the validity of the district court's present decision to grant class status.

Rule 23(c)(4)(A) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues, . . . and the provisions of this rule shall be construed and applied accordingly." The Rules Committee, in adding this subsection, expressly foresaw the use of the class mechanism to dispose of issues common to a class even though other issues essential to a final resolution of the suit would have to be litigated in independent actions. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 106 (1966).

Clearly, the controlling question of law as to defendant's liability in this case is readily amenable to disposition by class suit. The question of defendant's liability under the Act involves a single determination of law. Thus, the task facing a court in making the threshold determination is essentially the same whether one plaintiff be involved or whether a class of 800,000 be involved. The additional managerial tasks forced upon a court are more than offset by the judicial economy realized in disposing of the controlling legal issue in one consolidation proceeding. However, having approved initially the class action as the proper method to dispose of the issue of defendant's legal liability, the district court, as we have said, is not frozen into this mode for the disposition of the remaining issues involved in this suit. Therefore, we cannot

accept, on these facts, defendant's claim that the class is per se unmanageable, at least at this stage.

The benefit for defendant in our present holding is two-fold. First, it is not exposed to the danger of repeated and possibly inconsistent adjudications on legal liability to those class members who do not elect to withdraw. Second, if the district court determines that defendant has incurred no legal liability under the Act for its conduct, the issue is *res judicata* as to any subsequent suit in any forum by any included member of the class on this cause of action.

III. THE LACK OF INTEREST EXPRESSED BY THE CLASS

Defendant contends that few members of the class have expressed an interest in these proceedings. It asserts that the plaintiff therefore seeks to impose an overwhelming and potentially disastrous liability on it on behalf of individuals who have no interest in the litigation.

The 1966 amendments to Rule 23 did not make positive assertions of interest the requirement for participation in the class. Rather, it installed the controversial "negative option" system. To be included, one need do nothing after receiving notice. Only if one wants to opt out is affirmative action required. The resultant thrust of the rule is not as to the quantity of the expressed interest. In fact, the absence of any affirmative manifestation by other members of the class at this initial stage seemingly would indicate their interest in being included. Instead, the central point of inquiry for the district court under the amended rule is the quality of the class representation. Therefore, we find the alleged lack of interest at this point immaterial to the question of whether this class action should be allowed to proceed.

IV. THE CONGRESSIONAL INTENT.

Defendant contends Congress intended only independent enforcement of the Act. It claims the basic purpose of the class action under Rule 23 was to allow aggregation of small individual claims to create an amount in controversy sufficiently large to attract counsel to pursue the claim. Congress allegedly intended to obviate the need for the rule under the Act by providing for recovery of at least $100 to the successful suitor plus attorney's fees. Therefore, defendant argues that Congress, by its drafting, implicitly proscribed class enforcement of the Act.

Against this, defendant paints a scenario as to the potential result if class treatment is accorded this suit. It claims it will suffer liability of up to eighty million dollars and bankruptcy if liability be found even though the class suffered only minimal damage from the alleged violation. Further, it contends the alleged violation constituted no more than a breach of a technicality in the Act. It argues Congress could not have intended to put responsible credit institutions into the dilemma of charting their path between absolute compliance with every technical provision of the Act on the one hand and bankruptcy on the other. Therefore, says defendant, Congress implicitly intended that class enforcement of the Act not be available because of the severity of the remedy imposed.

Defendant's contention assumes a positive correlation between class litigation on the underlying legal issues posed by the Act and class litigation on the issue of damages. However, because of the earlier discussed structure of Rule 23, merely because class treatment has been afforded litigation of the underlying legal issues does not mean that the issue of damages must be similarly adjudicated. Although Congressional policy in the Act may militate against class enforcement of the damage provisions, we do not believe this alleged prohibition in

any way affects our determination that the question of whether a violation of the Act's provisions occurred can be litigated in a class proceeding.

First, there is no express proscription against class treatment of private suits prosecuted under the Act. In allowing private suits, Congress intended the enforcement programs of the responsible agencies under the Act to be supplemented by the efforts of "private attorneys-general." Thus, Congress manifested a desire for strong and broad-scale enforcement of the Act.

Second, and most importantly, Congress has expressed a strong interest in the efficient administration of justice, manifested in its authorization of the Federal Rules of Civil Procedure. Since the original enactment of that mandate, the succeeding revisions and streamlinings of the Federal Rules have been submitted to Congress after adoption by the Supreme Court and before implementation in the federal courts. Thus, Congress has expressly passed upon and implicitly approved the attempt in Rule 23 to utilize one consolidated proceeding, where appropriate, to dispose of multiple suits involving common elements.

Consequently, we believe we have an express mandate of Congress to use Rule 23 if that will effect the most efficient disposition of a controversy while protecting the rights of the individual litigants. Where there is such an express mandate, we must warily regard any argument that implications allegedly contained in the terms of another act countermand that explicit mandate. The implications allegedly militating against class enforcement of the Act, by defendant's own admission, go to the assessment of damages. However, they do not go to the issue of whether class actions should be allowed in the declaratory resolution of the underlying legal issue here in controversy.

Our conclusion is buttressed first by the presence of an analogous provision in the Clayton Antitrust Act. 15 U.S.C. §15 (1971). That section provides for treble

damages and award of attorney's fees to successful litigants; it has long been enforced in class suits. Imputing such knowledge to Congress, as we must, we believe if Congress had intended the provisions of the Act not be similarly enforced in class proceedings, it would have included an express proscription in the Act.

Our conclusion is buttressed secondly by the legitimate interest of the judiciary in preserving its resources and in the efficient administration of justice. We think it can be said those ends are served by having the one legal issue common to potentially hundreds of thousands of suits adjudicated in one consolidated proceeding. Consequently, as to litigation of legal liability, the policy of the Act fails to overcome the lack of an express prohibition when viewed in the context of events contemporaneous to the passage of the Act and when coupled with the interest of the judiciary in conserving its resources.

If there is any implicit Congressional bar against class enforcement of the Act, it is as to the element of determining individual damages. However, we need not reach that question at this point. Should liability under the Act ultimately be found in the class proceeding, the district court then will have to consider whether the remaining issues are appropriate for disposition in class proceedings. In so doing, it first will have to determine, purely under Rule 23 criteria, whether the positive factors in favor of, or the negative factors against, allowing continued litigation by the class predominate.

If the district court should ultimately determine under Rule 23 criteria that proof of membership and defendant's counterclaims are appropriate for class disposition, it next must consider whether Congress intended to bar absolutely class enforcement of the damage provisions of the Act. If it finds no absolute bar, it will have to determine the weight it will attach to those aspects in the Act which might undercut allowing the class as to litigating damages. Once it has assigned a weight to those factors,

it must decide whether on balance, those factors, together with the negative factors under the Rule 23 criteria, outweigh the initial predominance of factors in favor of class adjudication of those remaining issues.

If the court ultimately determines these remaining issues should be disposed of in independent suits, it has the power to dismiss the class element of the proceeding at that point.[4] Each class member could then press his independent claim in any forum meeting venue requirements.

V. CONCLUSION.

In sum, we conclude the district court did not abuse its discretion in its pretrial determination that plaintiff could proceed on behalf of the class. Further, we conclude that, at the least, there is nothing in the Act which militates against litigation of legal liability under the Act in a class proceeding. We have considered defendant's remaining contentions, as well as the points raised by plaintiff on cross appeal, and find them inappropriate for resolution by this court at this juncture.

The order of the district court allowing this case to proceed as a class action will be affirmed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

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4. Such dismissal, of course, would in no way affect the validity of the class adjudication and determinations made up to that point.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

15 U. S. C. § 78(f).

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any

provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

June 6, 1934, c. 404, § 6, 48 Stat. 885.

15 U. S. C. § 78aa.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

28 U. S. C. §§ 1291 and 1292(b).

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348.

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from: . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951,

IN THE

Supreme Court of the United States

AUG 29 1973

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 29, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

1. Did Rule 23, Federal Rules of Civil Procedure, as amended in 1966, change the substantive law to permit a "fluid recovery" of money damages to be awarded under the antitrust laws and Securities Exchange Act of 1934 to a "class as a whole" of future purchasers or sellers, many of whom could not have been injured in their business or property or in any other way by defendants?

2. In this *in personam* action for money damages, do due process and Rule 23 require individual notice to the 2,250,000 class members "who can be identified through reasonable effort"?

3. May 90% of the cost of notice to such a "class" in such an action, in the amount of $19,530, be imposed upon defendants when such costs concededly will be unrecoverable if defendants prevail at trial on the merits?

4. May defendants be compelled to undergo a preliminary trial on the merits before the Court in a jury case in order to determine whether, on the basis of the probability of plaintiff's success on the merits, they will be compelled to finance a lawsuit against themselves?

5. Without distortion of substantive law, is this case manageable by any reasonable interpretation of Rule 23?

Statement of the Case

Plaintiff's claim upon the discretionary jurisdiction of this Court rests largely upon mischaracterizations of the nature and effect of the decisions below. A rather full statement of the case is necessary to reveal how far astray plaintiff has gone in his attempt to broaden the impact of this case beyond its own facts and the careful limitations of the Court of Appeals' decisions.

The Complaint

The complaint (1ra*) in this action, filed on May 2, 1966, alleges that the suit is a class action brought on behalf of all purchasers and sellers of odd-lots on defendant

* "ra" refers to respondents' supplemental appendix, which follows this brief.

New York Stock Exchange ("the Exchange"). This class was subsequently limited by the District Court to purchasers and sellers during the period May 1, 1962 through June 30, 1966. (52 F.R.D. at 261; 43-44a) Defendants Carlisle & Jacquelin and DeCoppet & Doremus, member firms of the Exchange, are alleged in the first two causes of action to have violated Sections 1 and 2 of the Sherman Act by fixing the odd-lot differential or commission. In the third cause of action, the Exchange is alleged to have violated Section 6 of the Securities Exchange Act of 1934 by failing adequately to regulate the odd-lot differential.

The complaint demands (1) treble damages from the odd-lot firms for plaintiff and his alleged class in an amount to be established at trial; (2) a "fund [for the payment of such damages] in an amount equal to treble that portion of the differential collected in the past which has been excessive"; (3) an unspecified amount of damages from the Exchange; (4) an injunction prohibiting any differential which is "excessive"; and (5) attorneys' fees.

Antecedent Decisions Below on the Class Action Question

Upon motion by defendants, the District Court (Tyler, J.) by decision dated September 27, 1966 (41 F.R.D. 147; 8ra) dismissed the action as a class action because (a) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class; (b) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; and (c) questions common to the class did not predominate over questions affecting individual members.

Plaintiff appealed from the District Court's decision and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. The Court of Appeals (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, J.) by decision dated December 19, 1966, held that the denial of class action status was appealable as a final order under 28 U.S.C. §1291 because, in view of the small amount of the individual claim involved, it constituted the "death knell" of the action. 370 F.2d 119, *cert denied* 386 U.S. 1035 (1967); 1a.

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, the Court of Appeals (Medina and Hays, Circuit Judges, per Medina, J.) reversed, articulated a number of principles in regard to facts then in the record, expressly retained jurisdiction, and remanded to the District Court for an evidentiary hearing to determine further facts consistent with the Court's opinion. 391 F.2d 555; 5a.

On the question of notice, the Court of Appeals said in its 1968 opinion:

> "Notice, as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> • • •
>
> "The task of furnishing notice to the class members *in such a case as this* must rest upon the representative party when he is the plaintiff." 391 F.2d 568; 24a. (italics added)
>
> • • •

"* * * we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; 25a.

* * *

"* * * if the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." 391 F.2d at 570; 27a

On the question of manageability, the Court of Appeals said:

"Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them.

* * *

"If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue.

"* * * it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action." 391 F.2d at 567; 21-22a (footnotes omitted).

In conclusion, the Court of Appeals stated:

"Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administra-

tion of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; 28a.

Chief Judge Lumbard filed a dissenting opinion in which he catalogued the difficulties that would be inflicted upon the Court in managing the action as a class action and stated, among other things:

> "Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.
>
> "The appropriate action for this court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." 391 F.2d at 572; 31a.

After submission of lengthy stipulations and a short hearing, by opinion and order dated April 7, 1971 (52 F.R.D. 253; 32a), the District Court made extensive findings of fact (33-39a) pursuant to the remand instructions of the Court of Appeals. In summary, the District Court found that there were 6,000,000 members of the class; 2,250,000 of these could be identified through reasonable effort and the remainder could not. Class members resided throughout the United States and most foreign countries. During the period for which the class was defined (1962-1966), the average odd-lot differential per transaction was

approximately $5.18 and the average buyer or seller had approximately 5 transactions. The cost of distribution of a settlement fund in a similar case, *Cherner* v. *Transitron Electronic Corporation,* 201 F.Supp. 934 (D.Mass. 1962), amounted to $25.47 per person excluding attorneys' fees, and $33.80 per person including attorneys' fees.

Upon such findings, the District Court went on to hold, directly contrary to its initial decision, that the action could be maintained as a class action. To do this, the Court adopted the novel theory of a "fluid class recovery" to benefit future odd-lot purchasers and sellers through an adjustment of the odd-lot differential *in futuro.* This concept, the District Court held, would mean that gross damages can "be fairly estimated without having individual claims filed by each class member." 52 F.R.D. at 262; 44a. With respect to payment of any possible damages, the Court held:

> "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. * * * I think it appropriate, as plaintiff urges, to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not wholly relevant to the conditions of this case * * *." 52 F.R.D. at 264; 49a.

The Court found "that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable

by the court until such time as the fund is depleted." 52 F.R.D. at 265; 50a.

Despite finding that 2,250,000 of the class members can be identified by running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; 34-37a), the District Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a ¼ page notice would be published once in each of four newspapers (52 F.R.D. at 267-268; 54-58a). Thus, less than ½ of 1% of the readily identifiable class members would receive individual notice.

Since plaintiff had stated from the outset that he could not pay the expense of individual notice, the District Court decided to hold a preliminary hearing on the merits to serve as a basis for allocation of the expenses of the nominal notice that the Court thought sufficient. 52 F.R.D. at 269-272; 58-64a. The preliminary hearing (or so-called "mini-hearing") was then held over defendants' strenuous objection. Both sides submitted documentary evidence and briefs. No witnesses were called. Plaintiff concluded his argument with a plea that he could not pay any more than nominal notice costs.

The District Court subsequently issued a further opinion (54 F.R.D. 565; 72a) concluding that the odd-lot defendants had fixed the differential in 1951, which was a *per se* violation of the antitrust laws—with no consideration given to the reasonableness of the circumstances, or of the differential, or to the fact that, as its minutes showed (Ex. J at the preliminary hearing), the S.E.C. had advised the parties before the 1951 differential was changed

that it had no objection to the new rate—and that the Exchange was an active participant through its failure to regulate. The District Court then found that plaintiff was more likely to prevail at trial on the merits and ordered defendants to pay 90% ($19,530) of the notice cost.

The Record on the Issues of Liability and Damages

The District Court based its substantive conclusions on the fact that the Exchange regulated the odd-lot differential through settled practice rather than formal rule. The District Court completely ignored the regulatory context in which the differential was determined, including S.E.C. supervision and hearings (54 F.R.D. at 572; 83a).

Defendants had contended at the mini-hearing that under this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), and its progeny, and *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), the following uncontroverted facts placed in the record by defendants showed plaintiff's claims to be without merit:

> (1) Sections 19(b)(9) and (11) of the Securities Exchange Act, 15 U.S.C. §§78s(b)(9) and (11), 7ra, give the S.E.C. power to order changes in rules *and practices* of the Exchange particularly in respect to the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales, when necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange.
>
> (2) The S.E.C. has concurred that practices are co-equal with rules for purposes of Section 19(b). *In re the Rules of the New York Stock Exchange,* 10 S.E.C. 270, at 293 (1941).

(3) Historically it had been the practice for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S.E.C., and such practice was left undisturbed by the S.E.C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange,* 10 S.E.C. 270, 284, 287-288 (1941).

(4) Between 1950 and 1964 the Exchange had each year advised the S.E.C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange" (Ex. E at the preliminary hearing).

(5) The 1951 increase in the differential here alleged to be a violation of the antitrust laws and the Exchange Act was, with the approval of the Exchange, presented to the S.E.C. by the odd-lot defendants and elicited S.E.C. approval, as shown by the following minutes of the S.E.C.:

> "After due consideration, the Commission took the position, and so advised Mr. Hanrahan [attorney for the odd-lot defendants], that * * * the Commission had no objection to the present proposal for an increase in the odd-lot differential and would take no action, if the firms of Carlisle & Jacquelin and DeCoppett & Doremus should proceed with such increase." (Ex. J. at preliminary hearing).

(6) The question of the 1951 increase in the differential was thereafter presented to the S.E.C. again by the Midwest Stock Exchange and approved after a two-day hearing (Ex. Q, Ex. 1, p. 183; Ex. 7, pp. 41-44 at the preliminary hearing).

(7) Formal adoption of the increase by the Exchange was reported to the S.E.C. by the Exchange's

letter of August 17, 1951 (Ex. K at the preliminary hearing).

(8) In April, 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time and in 1966 the Exchange amended that rule at the request of the S.E.C. made pursuant to Section 19(b) of the Exchange Act to raise the breakpoint to $55* (Ex. C. at the preliminary hearing).

(9) A cost study undertaken by Price Waterhouse (Ex. A at the preliminary hearing) at the direction of the Exchange and the S.E.C. was completed on June 14, 1966 and found the past profits of the odd-lot defendants to have been reasonable in comparison to similar businesses.

(10) In 1969, the Justice Department approved the merger of the two odd-lot firms, principally on the ground that the odd-lot business was unique and required a unitary system of operation (letter of Richard W. McLaren, September 17, 1969; Ex. D at the preliminary hearing).

Thus, despite clear statutory power over the differential, the S.E.C. ordered no change until 1966—apparently satisfied that the differential it had approved in 1951 was appropriate for that 15-year period.

Defendants also contended that even if there were liability, there could be no provable damages. The damage estimates of the District Court were based not upon any evidence but upon the assumption that because there was in 1966 a reduction in the odd-lot differential to reflect

* As publicly announced, effective July 7, 1972, due to economies recently effected in the manner of handling odd-lot orders, the differential was reduced by amendment of Exchange rule after the prior required notification to the S.E.C. so that all odd-lot trades are presently effected at a uniform ⅛ point. Of course, this change does not benefit the "class" of purchasers and sellers during 1962-1966 which plaintiff claims to represent.

economies, the differential during the 1962-66 period would have been, absent the allegedly illegal rate-fixing, the differential after the 1966 reduction. 52 F.R.D. at 265; 51a. Defendants had argued that the record showed that if the differential had not been established by practice, it would have been set by rule of the Exchange (as it was in 1964) or by the S.E.C. exactly at the point at which it was set by the alleged conspirators because both regulatory agencies had determined such level to be reasonable.

The Jurisdictional Basis for the Decision Below

Thereafter, defendants moved the Court of Appeals to take up the matter again pursuant to the jurisdiction which that Court had retained in its 1968 decision. By order dated May 1, 1972, the Court (Medina, Lumbard and Hays, Circuit Judges) granted the motion (88a). Prior thereto, and because plaintiff had attacked the jurisdiction retained by the Court in its 1968 decision, defendants filed a notice of appeal. Plaintiff's motion to dismiss the appeal was denied by the Court's order of June 29, 1972* (91a).

---

* Plaintiff's attack on the jurisdiction of the Court of Appeals is unfounded. The mandate in relevant part read, "remanded to said District Court for the proceedings in accordance with the opinion of this court * * *". That opinion expressly retained jurisdiction. Plaintiff's citations are inapposite. In *In re Nevada-Utah M & S Corp.*, 204 Fed. 982 (2d Cir. 1913), there was no retention of jurisdiction. The Court denied rehearing after issuance of the mandate but indicated that it had power to require return of the mandate. In *Meredith* v. *Fair*, 306 F.2d 374 (5th Cir. 1962), the Court did not reserve jurisdiction, held that its mandate could not be stayed after issuance, but recalled the mandate to correct a proceeding that it adjudged inconsistent with the intent of its decision. Furthermore, the decision of the District Court herein ordering defendants to pay $19,530, which will never be recovered, constitutes a perfect example of a final order appealable under the collateral order doctrine, 28 U.S.C. §1291; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

The Decision Below

After receiving briefs and hearing oral argument, the Court of Appeals by decision dated May 1, 1973 (92a) (Medina, Lumbard and Hays, Circuit Judges), vacated the findings and conclusions of the District Court on the mini-hearing, reversed the District Court's ruling permitting the action to be prosecuted as a class action, and dismissed the action as a class action without prejudice to the continuance of the action by plaintiff individually. Judge Medina, joined by Judge Lumbard, filed an opinion (92a) based on the principles set forth in the Court's 1968 decision and well-established precedents of both this Court and other Courts of Appeal. The opinion held that:

1. Rule 23 is a procedural device to facilitate judicial disposition of the individual claims of separate members of a class of persons so numerous that joinder of all members is impractical; the rule was not intended to affect substantive rights, nor could it under the Enabling Act.

2. Rule 23 cannot alter the principles of substantive law to make permissible a "fluid class recovery" for claims under Section 4 of the Clayton Act and Section 6 of the Exchange Act.

3. In an *in personam* action for money damages, *"such * * * as this"*, Rule 23(c)(2) and due process require "individual notice to all members who can be identified through reasonable effort."

4. In a purely adversarial situation *"such * * * as this"*, the plaintiff must pay the expense of giving notice to the members of the class.

5. The mini-hearing on the merits was not authorized by Rule 23 or any other rule, statute or principle and violated defendants' constitutional safeguards.

6. The evidence on remand as to plaintiff's unwillingness to pay for notice, the diversity and dispersion of the class, and the difficulty of processing and distributing any recovery, as compared with the costs of administration, showed the action to be unmanageable as a class action, as had been feared by the majority and contended by Chief Judge Lumbard in the Court's 1968 opinions.

Judge Hays filed a separate memorandum (120a) concurring in the result because he could not accept the District Court's requiring defendants to pay 90% of the cost of notice ($19,530) which could never be recovered if defendants prevailed at trial on the merits.

Reasons for Denying the Writ

I. The decision below rests on the peculiar facts of this case and upon undisputed principles of law articulated by this and other appellate courts.

The decision of the Court of Appeals did decide issues important to this case. The Court decided those issues on the peculiar facts of this case and upon undisputed principles of law. There is no conflict with any decision of this Court or of any Court of Appeals. Indeed, the decision below fits without difficulty into the developing jurisprudence in the field. See *Grad* v. *Memorex Corp.*, CCH Fed. Sec.L.Rep. ¶94,029 (N.D. Cal. June 19, 1973). Therefore, this case does not merit consideration by this Court.

A. Rule 23 is a procedural device that cannot alter substantive rights.

The Court of Appeals' rationale, correctly, began with the proposition that it was construing a procedural rule designed to achieve economy and uniformity of decision, and a rule which could not change the substantive law,

enlarge existing remedies, or sweep away established procedural safeguards (107a).

This Court promulgated Rule 23 pursuant to the Rules Enabling Act. That Act provides that:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U.S.C. §2072; 17ra.

If the Rule were construed to permit alteration of substantive rights, the Rule as so applied would be invalid under the Enabling Act. *Snyder* v. *Harris,* 394 U.S. 332 (1969); *Sibbach* v. *Wilson and Company,* 312 U.S. 1 (1940).

From the face of Rule 23(b)(3), it is clear that the Rule is a procedural device for bringing together in one forum existing claims of actual individual plaintiffs to achieve economies and uniformity of decision where that can be done without sacrificing procedural fairness or bringing about other undesirable results. See also Advisory Committee Note, 39 F.R.D. 98, 102-104; 18, 26-28ra. Professor Benjamin Kaplan, who at the time of the 1966 amendment of the Rule was the Reporter to the Advisory Committee and subsequently became a member of the Committee, has written:

> "The object [of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 Harv. L.Rev. 356, 390 (1967).

B. The substantive law does not authorize a "fluid" or any other recovery for "the class as a whole" or for persons not injured.

The "fluid class recovery" for the "class as a whole", including many persons who could not have been damaged, is directly contrary to a decision of this Court on Rule 23, contrary to Section 4 of the Clayton Act, and contrary to all existing precedent in respect to Section 6 of the Exchange Act.

This Court has decided that the alleged claims of many absent individuals may not be treated collectively as "the class as a whole", and that the 1966 amendment to Rule 23 could not and did not effect a change in a federal statute. *Snyder* v. *Harris, supra.*

The complaint seeks treble damages under Section 4 of the Clayton Act (15 U.S.C. §15; 149a). That statute provides in relevant part that "Any person who shall be injured in his business or property * * * shall recover threefold the damages *by him* sustained * * *" (italics added). No remedy is provided by which past wrongs can be righted by future rate adjustments or by payments of money damages to persons not injured in their business or property.

"[P]enalties which are not authorized by law may not be inflicted by judicial authority * * *", *Standard Oil Company of New Jersey* v. *United States,* 221 U.S. 1, 77 (1911). See also *Geddes* v. *Anaconda Copper Mining Company,* 254 U.S. 590, 593 (1921).

The word "damages" in Section 4 of the Clayton Act has never been construed to mean anything other than money damages for those who prove they were injured in

their business or property. Reduction of the odd-lot differential in the future will not compensate those who no longer trade; it is sure to benefit many who could not possibly claim any injury (those trading in the future but not during 1962-1966). Had Congress intended to permit the extraordinary recovery in antitrust actions which plaintiff proposed, it would have so provided. See *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), in which this Court observed:

> "In enacting these [antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their *actual* damages every time they were injured in their business or property by an antitrust violation." (at 262; emphasis added)
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> • • •
>
> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." (Note, at 263)

The Court of Appeals for the Third Circuit, in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (June 19, 1972), in rejecting the "death knell" theory of finality for purposes of appeal from denial of class action status, also rejected the argument that "• • • the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as §4 of the Clayton Act". The Court said:

"The decision in Snyder v. Harris, *supra,* would seem to indicate that the Court had a much more limited goal in mind when it promulgated the revised Rule 23. Allowing the aggregation of claims would have been more consistent with such an intention." (Note 7; at 623)

As Judge Medina pointed out, the *Drug* cases (*State of West Virginia* v. *Chas. Pfizer & Co.*), 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971), which dealt with voluntary settlements of class actions, are not precedent for a "fluid class recovery" in a litigated case such as this. 103-104a.

The complaint also seeks to recover damages against the Exchange under Section 6 of the Exchange Act. That Act does not authorize a private damage suit for violation of Section 6. This Court has not spoken to that issue. The leading case of *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), has articulated the principles for recovery of damages through a judicially implied private right of action based on Section 6. It is clear from both the majority opinion in *Baird* v. *Franklin* and Judge Clark's dissenting opinion that recovery must be compensatory and, under the common law principles which the Court applied, is obtainable only upon proof of injury proximately caused by the statutory violation.

"It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none."

* * *

"Granted a right of action in plaintiffs, then, the final question is as to damages and whether the Ex-

> change's breach of duty was a proximate cause of plaintiffs' losses." at 245.

The principles of the *Baird* decision have been followed in all succeeding decisions on Section 6 liability. See, *e.g., Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), *cert. denied*, 391 U.S. 913 (1969); *Pettit* v. *American Stock Exchange*, 217 F.Supp. 21 (S.D.N.Y. 1963).

Furthermore, the Exchange Act vests in the Securities and Exchange Commission regulatory authority over the odd-lot differential (§§19(b)(9) and (11), 15 U.S.C. §§78(s)(b)(9), (11); 7ra). The District Court may not intrude by itself fixing the differential. See *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

C. Both Rule 23 and due process require "individual notice to all members who can be identified through reasonable effort".

The Court below held that in this *in personam* suit for money damages, individual notice was required for the 2,250,000 class members whose names and addresses were readily available.

This Court held in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950), that due process requires individual notice to those whose property rights are to be adjudicated and whose names and addresses are known.

In *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), this Court said:

> "• • • notice by publication is not enough with respect to a person whose name and address are known or very

easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." at 212-213

Thus, Rule 23(c)(2) reflects the decisions of this Court by requiring individual notice to all members who can be identified through reasonable effort.* The Advisory Committee's Note indicates that such notice is mandatory and not discretionary. 39 F.R.D. at 105-107; 55-56ra.

Plaintiff argues that this action can be considered a Rule 23(b)(2) action to avoid the notice requirements of Rule 23(c)(2). In its 1968 decision, the Court of Appeals correctly held this not to be an action predominantly or exclusively brought for injunctive or declaratory relief and therefore not within Rule 23(b)(2). See Advisory Committee's Note, 39 F.R.D. at 102; 24ra. Money damages are what this suit is all about. The Court of Appeals did not rule in its 1968 decision, as plaintiff suggests, that a (b)(1) or (b)(2) action was subject to the individual notice requirements of Rule 23(c)(2). 391 F.2d at 564-565; 17a. The Court merely held that some form of notice was required by due process in (b)(1) and (b)(2) actions. There is, therefore, no conflict with the decision in *Hammond* v. *Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972), which said only that "The notice requirement of Rule 23(c)(2) does not apply" to Rule 23(b)(2). The Court below agrees.

Plaintiff relies on the Third Circuit's affirmance of *Katz* v. *Carte Blanche Corporation*, which is set forth in his Appendix (136a). The District Court's decision there, 53

* The *Drug* cases, *supra*, are not to the contrary, as the Court below held. See N17, 109-110a.

F.R.D. 539 (W.D. Pa. 1971), *aff'd*, —— F.2d —— (3rd Cir. 1973), is entirely consistent with the decision of the Court below since it held that individual notice to 800,000 members of the class of Carte Blanche credit card holders was required by due process and Rule 23(c)(2):

> "One of the basic rationales underlying the class action mechanism is that it will afford large numbers of claimants with similar but individually small claims access to the courts. Nevertheless the rule itself provides, indeed requires, individual notice when the individual members of the class are identifiable through reasonable effort." 53 F.R.D. at 545.

There is no conflict with this Court's decision in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), which dealt only with the question of adequacy of representation and not with notice.

Plaintiff suggests in the statement of his Second Question (Pet. 3) that it is unnecessary to give the individual notice required by Rule 23 and due process because the statute of limitations has run. The suggestion ignores considerable authority indicating that the pendency of a class action tolls the statute of limitations. See *State of Utah* v. *American Pipe & Construction Co.*, 473 F.2d 580 (9th Cir. 1972), *cert. granted*, —— U.S. —— (1973); *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec. L. Rep. ¶93, 489 (S.D. Iowa 1972) (cited by plaintiff at Pet. 27); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521 (S.D.N.Y. 1971). Furthermore, many alleged class members may wish to assist in determining the course of the action, and others may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious. These members are entitled to such options, and Rule 23 provides them through the requirement of notice.

D. "In such a case as this", it is clear that plaintiff must bear the burden of notice.

Plaintiff argues that the decision below requires a plaintiff in all Rule 23(b)(3) actions to pay for the cost of notice. The lower Court's decision is far narrower.

In its 1968 decision, the Court of Appeals ruled that "in such a case as this" the task of furnishing notice must rest upon the representative party when he is the plaintiff. 391 F.2d at 568; 24a. In the decision below, the Court reiterated the limited nature of this holding (alternatively using the language " 'in this type of case' "; 97a), pointing out that this is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Exchange Act and not a shareholder's action (such as those cited by plaintiff at Pet. 16; 26-27) or a case against a public utility sending monthly bills to its customers. N 5 at 97-98a. In such cases, the cost of notice question is to be decided on the particular facts before the court.

The District Court's order would have resulted in a clear taking of defendants' property in substantial value* with the assurance that it would *not* be returned should defendants be successful at trial. This alone was sufficient reason for Judge Hays to vote for reversal. Such a taking would violate defendants' right to trial by jury under the Seventh Amendment (36ra), see *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913), and to due process under the Fifth Amendment (146a). The cases cited by plaintiff as authority for such a taking deal only with a temporary taking in connection with a provisional remedy, with assurances for return. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

* The $19,530 assessment upon defendants is almost twice the jurisdictional amount required by 28 U.S.C. §§1331 and 1332.

E. The Court of Appeals' disapproval of the preliminary hearing was in accord with the Federal Rules, followed the decision of the Fifth Circuit and was necessary to preserve defendants' rights.

Rule 23 does not authorize a preliminary hearing on the merits to determine who is to pay for notice. Such a hearing subverts Rule 23's direction for prompt class action determination and subverts the procedures prescribed by other Federal rules, such as Rules 12 and 56, and the discovery rules. It also subverts defendants' right to trial by jury under the Seventh Amendment (36ra).

The decision below followed the decision of the Fifth Circuit in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). No other Court of Appeals decision is in conflict. See *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972). In *Miller*, Judge Wisdom held that the mere possibility that the District Court may have considered the merits on a Rule 23 determination was sufficient reason for reversal:

> "This portion of the order indicates to us that in passing on the propriety of the class action the district judge may have considered whether the petition stated a cause of action or whether Miller would succeed on the merits. This was improper. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.
>
> "The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to

Rule 23, and still be dismissed for failure to state a cause of action.

* * *

"* * * The Advisory Committee Notes make clear that a district judge is to consider only the specific requirements of sub-divisions (a) and (b) of Rule 23. The Committee stated with respect to sub-division (c) (1) of Rule 23:

> " 'In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. *The determination depends in each case on satisfaction of the terms of sub-division (a) and the relevant provisions of sub-division (b).*' " 452 F.2d at 427-428.

See also *Lamb* v. *United Security Life Company, supra,* (also cited by plaintiff at Pet. 27) refusing a preliminary hearing and discussing (at pp. 92, 370 - 92, 372) the problems and lack of safeguards inherent in such a hearing.

F. The peculiar facts of this case amply support the lower Court's decision that this case is unmanageable as a class action.

Plaintiff conceded that this case was unmanageable absent the significant changes in substantive law required for a "fluid class recovery" (114a). The evidence amply supports the finding of unmanageability. This Court does "not grant certiorari to review evidence and to discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). Such review by this Court in this case would be particularly inappropriate since dismissal of the action as a class action is consistent with the weight of relevant authority. See decision below, N 20, at 113a.

II. Plaintiff's petition seeks relief that can be granted only by Congress.

The Court below recognized that plaintiff asserts a legitimate social interest in finding a forum through which compensation can be available for millions of consumers asserting small claims under the antitrust, securities and other laws (118a). The Court also recognized that it was beyond the power of the federal courts to create that forum by interpretation of Rule 23 to effect substantive changes in the law.

> "From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress." at 118a.

It is the legislature's function to strike a balance between the need to redress relatively small grievances and the plain fact that "courthouses are not coliseums," *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 297-98 (2d Cir. 1969). Determination of policy concerning consumer class actions in federal courts should occur in the Congress.* This Court has so held:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important con-

* The Senate Commerce Committee is presently studying the question of consumer class actions.

gressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the Courts." *Snyder* v. *Harris, supra,* at 341-342.

Plaintiff's quotation of dicta from cases such as *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) and *Hanover Shoe Co.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968), is inapposite. Those cases did not involve an attempt to obtain substantive change through interpretation of procedural rule. Those opinions, furthermore, were written after trial on the merits with all the attendant procedural safeguards.

III. Even if the Court wishes to consider the Rule 23 issues raised below, this is not the case in which to do so.

The evidence shows that the "class" in this case is not the individuals seeking to prosecute existing claims whom Rule 23 was designed to assist. There is, in short, no real class here. There are plaintiff, and his lawyers, who have litigated this case for seven years with great attendant publicity but no intervention by any other party.

Since there are no individuals seeking to press claims for money damages, there is no social objective for continuation of this case as a class action. The rate against which

the prayer for injunctive relief is directed in the complaint has changed thrice, twice under the auspices of the Securities and Exchange Commission, the last time approximately one year ago. The alleged conspirators have been, with the approval of the Justice Department, permitted to merge and now are conducting the odd-lot business as the only odd-lot firm on the Exchange. Surely, the facts of this case do not cry out for the attention of this Court.

Moreover, the lower Court's decision permits plaintiff to continue to prosecute this action on his own behalf. There is sufficient incentive for him, and his lawyers, to do so. Plaintiff has the incentive of treble damages. Section 4 of the Clayton Act also permits recovery of a "reasonable attorneys' fee" by a successful antitrust plaintiff, and this fee is not limited to a portion of the damages recovered but is to be computed on the basis of the worth of the services. See e.g. *Courtesy Chevrolet* v. *Tennessee Walking Horse Breeders,* 393 F.2d 75 (9th Cir. 1968), *cert. denied* 393 U.S. 938 (1968) (damages of $3,400; attorneys' fees of $10,000); *Advance Business Systems and Supply Co.* v. *SCM Corporation,* 284 F.Supp. 143 (D.Md. 1968), *aff'd* 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (damages of $16,714; attorneys' fees of $35,875); *Vandervelde* v. *Put and Call Brokers and Dealers Assn.,* 344 F. Supp. 118 (S.D.N.Y. 1972) (damages of $6,870; attorneys' fees of $55,000); *Finley* v. *Music Corp. of America,* 66 F. Supp. 569 (S.D. Cal. 1946) (no damages; attorneys' fees of over $9,000); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 218 F.Supp. 490 (D. Mass. 1963), *reversed on other grounds,* 333 F.2d 798 (1st Cir.), *cert. denied,* 379 U.S. 931 (1964) (damages of under $30,000; attorneys' fees

of $68,000). The District Court (Wyzanski, J.) in the latter case said:

> "Allowing a reasonable attorney's fee in excess of the losses sustained by the plaintiff is proper whenever those losses could not otherwise have been recovered." (at 492)

See also *Montague & Co.* v. *Lowry,* 193 U.S. 38, 48 (1904); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 346 F. 2d 661 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965); *Darden* v. *Besser,* 257 F.2d 285 (6th Cir. 1958). These cases and this principle were not considered by the Court of Appeals when it rendered its 1966 "death knell" decision. 370 F.2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967); 1a.

If plaintiff is unwilling to continue his individual action, the observation of Court of Appeals for the Third Circuit is appropriate:

> "If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the vindication of every individual wrong however slight. • • • If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." *Hackett* v. *General Host Corp., supra,* at 625-626.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied. The case should not be remanded to the Court of Appeals for *in banc* consideration because such consideration has already been denied by that Court.*

Respectfully submitted,

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August 29, 1973

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* *United States ex rel. Robinson* v. *Johnson*, 316 U.S. 649 (1942), cited by plaintiff (N18 Pet. 29), is not authority for this Court's remanding this case to the Court of Appeals for *in banc* consideration. In *Robinson*, a petition for rehearing had never been filed with the Court of Appeals. This Court remanded with leave to apply for rehearing *in banc*. Here, that petition has been made and has been denied. This Court lacks jurisdiction to direct rehearing, and the Court of Appeals lacks jurisdiction to reverse itself at this late date. See 28 U.S.C. §46(c); Rules 35 and 40, Federal Rules of Appellate Procedure.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange similarly situated, alleges

As a First Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

1. That this first cause of action arises under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, §4, 15 U.S.C. §15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

4. That plaintiff is an investor who, from time to time, and since at least 1960, has bought and sold stock registered on said defendant New York Stock Exchange in blocks of less than the ordinary unit of trading, which unit of trading

is, in most cases, one hundred (100) shares; each such block is referred to herein as an "odd-lot."

5. That plaintiff brings this action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on said defendant New York Stock Exchange. Plaintiff's claim and the claims of such persons involve common questions of law and fact and common relief is sought herein. Such persons are so numerous as to make it impossible to bring them all before the Court. Plaintiff will fairly insure the adequate representation of all such persons.

6. That at all times herein mentioned defendants Carlisle & Jacquelin and DeCoppet & Doremus were and still are limited partnerships under New York Partnership Law, Article 8, and member firms of said defendant New York Stock Exchange; each of said defendants Carlisle & Jacquelin and DeCoppet & Doremus is a registered odd-lot dealer on said defendant New York Stock Exchange and, as such, each buys and sells odd-lots for its own account.

7. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus together handle, and have in the past handled, approximately ninety-nine (99%) percent of all odd-lot transactions on said defendant New York Stock Exchange.

8. That the odd-lot transactions of plaintiff and of those on whose behalf plaintiff brings this action have been executed with said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

9. That at all times herein mentioned for the defendants Carlisle & Jacquelin and DeCoppet & Doremus did and each still does exact a charge known as a "differential," which it causes to enter into the price of the stock purchased

by or sold to plaintiff and those on whose behalf plaintiff brings this action.

10. That such differential is now twelve and one-half (12½¢) cents per share on all stocks selling below forty ($40) dollars per share and twenty-five (25¢) cents per share on all stocks selling at and above forty ($40) dollars per share.

11. That such differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus in conspiracy and combination with each other and with principal regional stock exchanges.

12. That said conspiracy and combination are in restraint of trade or commerce among the several states and, as such, are illegal under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

13. That as a result of said conspiracy and combination, such differential is and has been greater than it would have been under free competitive conditions.

14. That as a result of such conspiracy and combination, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have been paying for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

As a Second Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

15. That this second cause of action arises under the Sherman Antitrust Act, §2, 15 U.S.C. §2.

16. Plaintiff repeats and re-alleges paragraphs numbered "2" through "14", both inclusive.

17. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus have monopolized, and have combined and conspired to monopolize, dealings in odd-lot transactions in stocks listed on the New York Stock Exchange in violation of the Sherman Antitrust Act, §2, 15 U.S.C. §2.

18. That as a result of such monopolization, the aforesaid differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

19. That as a result of such monopolization, the differential is and has been greater than it would have been under free competitive conditions.

20. That as a result of such monopolization, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those whom plaintiff represents have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than otherwise they would have received for odd-lot sales.

As a Third Cause of Action Against Defendant New York Stock Exchange:

21. That this third cause of action arises under the Securities Exchange Act of 1934, §§6(b), 6(d), and 19(a), 15 U.S.C. §§78f(b), 78f(d), and 78s(a).

22. That this jurisdiction of the Court is based upon the Securities Exchange Act, §27, 15 U.S.C. §78aa.

23. Plaintiff repeats and re-alleges paragraphs numbered "1" through "15", both inclusive, and paragraphs numbered "17" through "20", both inclusive.

24. That the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus as described above is and

has been conduct inconsistent with just and equitable principles of trade.

25. That pursuant to the Securities Exchange Act of 1934, §§6(b), 6(d) and 19(a), 15 U.S.C. §§78f(b), 78f(d) and 78s(a), said defendant New York Stock Exchange is required to adopt and enforce rules prohibiting conduct inconsistent with just and equitable principles of trade and rules insuring fair dealing and the protection of investors.

26. That said Securities Exchange Act of 1934, §19(b), 15 U.S.C. §78s(b), recognizes the jurisdiction of national securities exchanges over odd-lot differentials.

27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff.

28. That as a result of the failure and refusal of said defendant New York Stock Exchange to take action, the differential is and has been greater than it would have been had said defendant New York Stock Exchange exercised its regulatory authority to eliminate and prevent conduct inconsistent with just and equitable principles of trade and to insure fair dealings and the protection of investors.

29. That as a result of such failure and refusal, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

WHEREFORE, plaintiff demands judgment:

A. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to pay treble damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

B. Directing defendant New York Stock Exchange to pay damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

C. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to establish a fund in an amount equal to treble that portion of the differential collected in the past which has been excessive.

D. Enjoining defendants Carlisle & Jacquelin and De-Coppet & Doremus from any further violations of the Sherman Antitrust Act, §§1 and 2, and from collecting any further excessive differentials.

E. Directing defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the amount by which the differential has been excessive in the past.

F. In favor of plaintiff for costs and expenses of this action, including reasonable counsel and accounting fees.

G. For such other and further relief as may be just.

Laventhal & Zicklin
Attorneys for Plaintiff

Section 19(b), Securities Exchange Act of 1934, 15 U.S.C. §78s(b)

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

Opinion and Order of the District Court Dated September 27, 1966

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This is an action brought by a New York resident, Morton Eisen, charging the two major "odd-lot" dealers on the New York Stock Exchange—defendants Carlisle & Jacquelin and DeCoppet & Doremus—with conspiring and combining to monopolize odd-lot trading and with charging excessive fees in violation of the Sherman Act. 15 U.S.C. 1 and 2. The complaint also pleads a third claim or cause of action against the New York Stock Exchange ("Exchange") upon the theory that the Exchange breached its duties prescribed by the Securities Exchange Act of 1934 for suspension of odd-lot trading. 15 U.S.C. 78f(b), 78f(d) and 78s(a). Eisen, who describes himself as an investor, asserts that he sues for himself and on behalf of all odd-lot purchasers and sellers on the Exchange.

The taproot of Eisen's three claims is the so called "odd-lot differential" charged by the broker defendants and other odd-lot dealers for transactions in other than 100 share lots of securities. As is well known, the normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "round-lots." Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the "odd-lot differential" is charged. At the time this suit was commenced, the differential was ⅛ point (12½ cents) per share when the price per share was 39⅞ or below and ¼ point

(25 cents) when the price was 40 or above. Effective July 1, 1966, however, this "break point" of $40 was increased to $55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid. It is Eisen's theory in this case that the two broker-dealer defendants, with the benign indulgence of the Exchange, have "established, increased and maintained" the differential.

The defendants have moved pursuant to amended Rule 23(c)(1), F.R.Civ.P., effective July 1, 1966, seeking to obtain an adjudication that the present action is not maintainable as a class action. Plaintiff, of course, relies on new Rule 23 to support his suit as a class action.

Amended Rule 23(a) sets forth four specific prerequisites to a class action:

(1) The class "is so numerous that joinder of all members would be impracticable";

(2) questions of law or fact common to the class exist;

(3) claims or defenses of the representative parties are typical of those of the class; and

(4) the representative parties will adequately protect the interests of the class.

Amended Rule 23(b) specifically states that for a suit to be maintained as a class action, the specific prerequisites just listed must be satisfied and, in addition, at least one of three following requirements or conditions must be shown:

1. Prosecution of separate actions by or against separate members of the class would create a risk of incon-

sistent or varying adjudications, or adjudications which would practically dispose of or impair the interests of class members not parties thereto;

2. the party opposing the class has acted or failed to act, thereby rendering appropriate injunctive or declaratory relief respecting the entire class; or

3. the court finds that questions of law or fact common to the class predominate over such questions affecting only individual members and, in addition, that the class action is superior to other available methods or procedures for fair and efficient adjudication of the controversy. See *Notes of Advisory Committee on Amendments to Rules of Civil Procedure* (hereinafter "Advisory Com. Notes"), 39 F.R.D. 98-100.

As will be suggested by the discussion hereinafter, plaintiff's suit could only fit in theory the last-mentioned category or requirement set forth in amended Rule 23(b)—i.e. that plaintiff's suit, if to be maintained as a class action, must be shown to present questions of fact or law common to the class which predominate over such questions effecting only individual members. Suffice it to say here that, despite belated unconvincing suggestions to the contrary in their reply brief, plaintiff's counsel originally intended and argued that their client's suit meets this requirement. Thus, plaintiff in effect attempts to show that his action is what was characterized under former Rule 23 as a spurious class action, and it may be at least generally helpful to consider some of the judge-made requirements and prerequisites for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule. See discussion at 39 F.R.D. 98-103.

The spurious class action under the former Rule was considered merely a permissive joinder device, and prior to the July 1, 1966 amendment, the judgment in such cases

bound only the original parties of record and those who intervened and became parties to the action. See *Lipsett* v. *United States*, 359 F.2d 956, 959 (2d Cir. 1966); *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247 (2d Cir. 1954); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Schatte* v. *International Alliance of Theatrical Stage Employees, etc.*, 183 F.2d 685 (9th Cir. 1950); *California Apparel Creators* v. *Wieder of California*, 162 F.2d 893 (2d Cir. 1947); *Cutler* v. *American Federation of Musicians, etc.*, 211 F. Supp. 433 (S.D.N.Y. 1962). The principal requirements for its use were that the character of the right sought to be enforced for or against the class be several, that there be a common question of law or fact affecting the several rights and that common relief be prayed for. Nevertheless, as I read the above cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated prerequisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23, even though they were not all spelled out therein. The prerequisite, for example, that the plaintiff bringing the action must be one who will fairly protect the interests of the class was one which, though recognized, did not always cause the courts undue concern, largely because only the original plaintiff and intervenors were bound by the judgment. The Court of Appeals for this Circuit, for example, having long recognized that a spurious class suit under former Rule 23 in reality was no more than a permissive joinder device, stated years ago that, in such suits, "there is no need for a searching inquiry concerning the adequacy of [plaintiff's] representation of others in the class." *York* v. *Guaranty Trust Co. of New York*, 143 F.2d 503 (2d Cir. 1944), *reversed on other grounds*, 326 U.S. 99 (1945). Notwithstanding that comparatively extreme statement, the courts in this circuit, as in others, did not permit use of the class action device under former Rule 23 where it appeared plainly that plaintiff could not properly protect the

interests of the class. See *Austin* v. *Warner Bros. Pictures*, 19 F.R.D. 93 (S.D.N.Y. 1953).

Now that amended Rule 23 purports to obliterate the old distinctions between "true," "hybrid" and "spurious" class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members of the class are bound by the judgment unless they expressly ask to be excluded from the class. See amended Rule 23(c)(3), F.R.C.P.; *Lipsett* v. *United States, supra.*

Assuming *arguendo* that plaintiff has adequately set forth and shown compliance with other prerequisites of paragraph (a) of the new rule, he has not established that he "* * * will fairly and adequately protect the interests of the class." This alone is enough for this court to make a determination that this action cannot be maintained as a class action. See *Advisory Com. Notes,* 39 F.R.D. 100 (1966).

Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists. In disposing of a similar contention made in *Austin Theatre* v. *Warner Bros. Pictures, supra* at 96, Judge McGohey of this court said, "However, here there is required no more than a superficial inquiry to determine that the plaintiff has failed to allege any facts to show that it will, as claimed, adequately represent the class." Such reasoning applies *a fortiori* under the new concept that all members of a class are bound by any judgment to be entered.

Eisen does not even attempt to estimate the extent of damages which he allegedly suffered as a result of the odd-lot differential, nor does he specify the nature or number of the transactions in which he engaged and wherein he was charged a "differential." A class action is premised in

part upon the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. See *Aalco Laundry & Cleaning Co.* v. *Laundry Linen & Towel Chauffeurs & Helpers Union,* 115 S.W.2d 89 (Mo. App. 1938). From the facts as presented, it is impossible to determine and rule that Eisen can adequately protect the interests of the absent members of his asserted class. Concededly, he alleges that he has been an active investor in securities since 1960. We are not told, however, in what he invested. Even assuming, as Eisen would have us do, that he bought and sold securities in odd-lots—i.e. in less than 100 share blocks, we do not know which of the more than 1,600 available listed stocks he purchased or sold, the price ranges of the stocks or the considerations that motivated his transactions. That these are relevant facts is beyond serious question. In the six years during which Eisen claims to have been an investor, over 1,147,000,000 shares of stock were traded in odd-lot transactions. Some of the participants in these dealings were investors like Eisen, but just as certainly others were dealers, traders, arbitrageurs and speculators. The prices of the shares involved ranged from several dollars to several hundred dollars. The nature of the myriad odd lot transactions was certainly varied; orders were limited or contingent, on margin or for cash, long or short, and for a fixed amount or on a long term investment plan.[1] In short, even if Eisen were given leave to serve an amended pleading setting forth with particularity the nature and amount of his own investment transactions, the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation.

Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the in-

1. See Rule 124 of the New York Stock Exchange.

terests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or non-existence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent the class. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940); *McArthur* v. *Scott*, 113 U.S. 340 (1884). In *Pelelas, supra* at 632, the court held, "* * * under it [Rule 23] the court is at liberty to consider the number appearing on the record as contrasted with the number in the class. * * * There must be a sufficient number of persons to insure a fair representation of the class." Eisen himself estimates—perhaps too conservatively—that the class numbers in the hundreds of thousands.[2] Thus, it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.

By far the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class, in my judgment, is that stemming from subparagraphs (2) and (3) of amended Rule 23(c). In substance, these provide, *inter alia*, that in a class action the best notice practicable must be furnished to the class members and that the notice must specifically warn such persons that they will be bound by any judgment in the action unless they appear and request exclusion therefrom. Further, of course, it is provided in subparagraph (c)(3) that the judgment, whether favorable or unfavorable to the class, shall include all members of the class as found by the court and who do not appear and obtain specific exclusion.

2. See defendant's affidavit by Sander Landfield wherein it is projected that there may have been as many as 3,750,000 odd-lot customers within the past four to six years.

As already suggested, this provision represents a most important substantive change from Rule 23 as it read prior to July 1, 1966. *Lipsett* v. *United States, supra.* Presumably aware of this change, Eisen claims to be the sole representative of hundreds of thousands of other persons who paid the odd-lot differential and who necessarily will be bound under Rule 23(c)(3) by any judgment in this action unless they specifically ask to be excluded after receiving appropriate notice. Yet he does not claim that one other person or entity has expressed the slightest interest in the prosecution of this action. See *Weeks* v. *Bareco Oil Co., supra* at 94. More important, Eisen and his counsel have taken the curious position in their papers and upon oral argument that press advertisements plus notices to stock exchange firms will constitute all the notice necessary in this case. To this, I am constrained to make two observations. First, in the light of the new concept under the amended Rule that members of a class are specifically bound by any judgment, favorable or unfavorable, unless they affirmatively "opt out", it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c)(2) and, even more importantly, with due process standards. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-320 (1950). In other words, as defense counsel have incisively argued, both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a "mere gesture" for those who cannot be identified. Because of obvious practical financial limitations inherent in the circumstances here presented, proper notice as required almost certainly cannot be given—and plaintiff is short of the mark in his arguments to the contrary. Second, plaintiff's erroneous notion that individual notice to members of the class is not required by amended Rule 23 but that publication, either by "free publicity" or by paid advertisement in newspapers of national distribution, or by both, is

sufficient, raises the suspicion, which may or may not be justified, that he is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. See *Advisory Com. Notes,* 39 F.R.D. 107; *Cherner* v. *Transition Electronic Corp.,* 201 F. Supp. 934 (D.C. Mass. 1962).

For reasons similar to those leading me to conclude that Eisen cannot fairly and properly represent the other members of the class, I am not satisfied that the questions common to the class predominate over questions affecting individual members. Rule 23(b)(3); see *Advisory Com. Notes,* 39 F.R.D. 103. Mention has already been made of the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation and the necessarily varied nature and quantum of the interest of other odd-lot purchasers and sellers. In my view, these circumstances create a powerful presumption that questions affecting individual members predominate over questions common to the class, and plaintiff has offered little or nothing to rebut this presumption. Moreover, these factors plus the previously discussed difficulties of providing adequate notice to the huge class as required by the amended Rule and by concepts of due process suggest almost insuperable difficulties in fair and proper management of this suit as a class action.

The motion of defendants is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually.

It is so ordered.

Dated: New York, N. Y.
September 27, 1966.

H. R. Tyer, Jr.
U.S.D.J.

Rules Enabling Act, 28 U.S.C. §2072

§2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, §103, 63 Stat. 104; July 18, 1949, ch. 343, §2, 63 Stat. 446; May 10, 1950, ch. 174, §2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, §12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, §1, 80 Stat. 1323.)

Advisory Committee's Note to Rule 23

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, *e.g.*, *Gullo* v. *Veterans' Coop H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D. Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F.Supp. 763 (E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F.Supp. 592 (E.D. Pa. 1941),

rev'd sub nom. Pennsylvania Co. for Ins. on Lives v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, *supra*, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, *e.g.*, *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F.Supp. 116 (W.D. Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill. 1951); *National Hairdressers' & C. Assn.* v. *Philad Co.*, 34 F.Supp. 264 (D. Del. 1940); 41 F. Supp. 701 (D.Del.1940), *aff'd mem.*, 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, *e. g.*, *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945) (see Chafee, *supra*, at 208); *cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945). But *cf.* the early decisions, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spuri-

ous" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice* ¶¶23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.,* 371 U.S. 801 (1963); but *cf. P. W. Husserl, Inc.* v. *Newman,* 25 F.R.D. 264 (S.D.N.Y.1960); *Athas* v. *Day,* 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen* v. *Black,* 234 F.2d 12 (10th Cir. 1956), *cert. granted,* 352 U.S. 888 (1956), *dism. on stip.,* 355 U.S. 600 (1958); but *cf. Wagner* v. *Kemper,* 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c) (1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra,* at 230-31; Keeffe, Levy & Donovan, *supra; Developments in the Law, supra,* 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions,* 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ. P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all

class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (*a*) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder or the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §562, at 265, §572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See *e. g., Giordano* v. *Radio Corp. of Am.,* 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v. *Erwin,* 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.,* 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (*b*) (*1*). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a) (2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 *Column.L.Rev.* 1254, 1259-60 (1961); *cf.* 3 Moore, *supra,* ¶23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class,

and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney,* 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug,* 142 F. Supp. 1, 154-59 (S.D.Calif.1956), *on app., State of California* v. *Rank,* 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole,* 263 F.2d 244 (2d Cir. 1959), *cert. denied,* 359 U.S. 978 (1959); *cf. Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.,* 219 F.2d 666 (5th Cir. 1955); 3 Moore, *supra,* ¶23.11 [2], at 3458-59.

Clause (*B*): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the

other members, might do so as a practical matter. The vice of an indivdual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.,* 30 F.Supp. 885 (W.D.Tenn. 1939); *cf. Smith* v. *Swormstedt,* 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp* v. *Bankers Securities Corp.,* 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd* ,230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway, Corp.,* 81 F.Supp. 957 (D. Del.1949); *Zahn* v. *Transamerica Corp.,* 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.,* 100 F.Supp. 461 (D.Del.1951); *Sobel* v. *Whittier Corp.,* 95 F.Supp. 643 (E.D. Mich.1951), *app. dism.,* 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.,* 111 F.Supp. 382 (E.D.Mich.1953); *Dann* v. *Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.,* 94 F.Supp. 549 (S.D. Calif.1950); *Ames* v. *Mengel Co.,* 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action

which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *cf. York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. *Cf. Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); 3 Moore, *supra*, at ¶23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and

runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County*,

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Fla., 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N. C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), *aff'd*, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view,

a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N. Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R. R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); *cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be

available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. *Cf.* Weinstein, *supra,* 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.,* 152 F.2d 851 (3d Cir. 1945), and Chafee, *supra,* at 273-75, regarding policy of Fair Labor Standards Act of 1938, §16(b), 29 U.S.C. §216(b), prior to amendment by Portal-to-Portal Act of 1947 §5(a). [The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be

theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c) (2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c) (1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the

decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d) (2).

Subdivision (c) (2) makes special provision for class actions maintained under subdivision (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d) (2) below.)

Subdivision (c) (3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b) (1) or (b) (2), those found by the court to be class members; in a class

action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c) (4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, ¶23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24

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F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv Stat. Assn.* v. *Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D. Tenn.1941); Kalven & Rosenfield, *supra*, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law, supra*, 71 Harv.L.Rev. at 935; 2 Barron & Holtzhoff, *supra*, §568; but *cf. Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, *supra*, at 280, 285; 3 Moore, *supra*, ¶23.12, at 3476. Under proposed subdivision (c) (3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, *supra*, at 284; Weinstein, *supra*, 9 Buffalo L.Rev. at 460.

Subdivision (*c*) (*4*). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

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Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (*d*) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d) (1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d) (2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (¶62869); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. *Cf. Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d) (2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.

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These indicators suggest that notice under subdivision (d) (2) may be particularly useful and advisable in certain class actions maintained under subdivision (b) (3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *cf. Dickinson* v. *Burnham,* 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd,* 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole,* 263 F.2d 244, 248-49 (2d Cir. 1959), *cert. denied,* 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, *supra,* at 230-31; *Brendle* v. *Smith,* 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.,* 201 F. Supp. 934 (D.Mass. 1962); *Hormel* v. *United States,* 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

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Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

Supreme Court, U. S.
FILED
SEP 19 1973
MICHAEL RODAK, JR., CLERK

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF AND APPENDIX PURSUANT TO RULE 24(5)

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September 19, 1973

IN THE

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Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 24(5)

This supplemental brief is submitted to call to the Court's attention the recent decision of the Court of Appeals for the Third Circuit in *Greenfield* v. *Villager Industries, Inc.*, 17 Fed. Rules Serv.2d 577 (3 Cir. June 21, 1973), reh. den. and reh. *en banc* den. (July 27, 1973), a copy of which is reprinted in the appendix hereto.*

* This supplemental brief is filed pursuant to this Court's Rule 24(5). Respondents' brief in opposition to the petition for certiorari was filed on August 29, 1973. The *Greenfield* decision became available to respondents' counsel on September 14, 1973 upon receipt of the Federal Rules Service advance sheets containing the opinion.

Petitioner argued in Points II and III of his petition that the decision below conflicted with the decisions of this Court and other courts of appeal because the decision below required that individual notice be sent to those class members whose names and addresses were readily available. Respondents pointed out (br. 19-21) that the holding of the Court below on the notice question was based on the decisions of this Court and did not conflict with the decision of any other Court of Appeals. *Greenfield,* which was decided a month prior to filing of the petition herein (and which the court records show to have been argued by one of petitioner's counsel herein), foursquare supports respondents' position and shows that not only is there no conflict in the circuits but that the Third Circuit is in agreement with the decision below on the notice requirements.

The *Greenfield* decision relies on the decisions of this Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), *Schroeder* v. *City of New York,* 371 U.S. 208 (1962) and *New York* v. *New York N.H. & H.R. Co.,* 344 U.S. 293 (1953), as well as the decision below in this case, to hold that when the names and addresses of class members can be identified through reasonable effort, due process *requires* individual notice. The Court of Appeals said:

> "Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound by a final judgment, and that interested parties normally have a real voice in the strategy and management of the litigation, the procedure can be tolerated, if not completely justified, only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice.
>
> • • •

> "Where names and addresses of members of the class are easily ascertainable, requirements of due process would dictate that the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,' Rule 23(c)(2), would be individual notice." 17 Fed. Rules Serv.2d at 584; 12-13 rsa* (footnote omitted)

Since individual notice was not given in *Greenfield,* the Court of Appeals reversed the District Court and held void all orders below effectuating a settlement and distribution of a settlement fund.

Respectfully submitted,

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September 19, 1973

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* "rsa" refers to respondents' supplemental appendix, which immediately follows.

RESPONDENTS' SUPPLEMENTAL APPENDIX PURSUANT TO RULE 24(5)

Greenfield *v.* Villager Industries, Inc.

US Court of Appeals, Third Circuit, June 21, 1973;
rehearing en banc denied, July 27, 1973
17 FR Serv2d 577; —— F2d ——

Appeal from the Eastern District of Pennsylvania. Before VAN DUSEN, ALDISERT and ROSENN, Circuit Judges.

ALDISERT, Circuit Judge. This appeal presents the question whether the notice to prospective class members ordered by the district court was 'the best notice practicable'' under the class action rule 23(c)(2), FR Civ P.

Appellants are registered owners of stock of Villager Industries, Inc., acquired during the years 1968 and 1969. Appellant Burnham is a New York investment banking and brokerage firm holding 22,972 shares of Villager common stock in street name for some 111 customers. Appellant du Pont is a brokerage corporation which, as a result of a recent merger with three other stock brokerage firms, holds 52,670 shares of Villager common stock in street names for 334 customers. Appellants were not formal parties to litigation brought by plaintiff-appellees, shareholders of Villager, against the defendant-appellees, Villager corporation and certain of its officers, directors and other shareholders. Burnham and du Pont present this appeal, contending that the district court failed to provide them with adequate notice at the hearing held on August 31, 1972, at which approval of a proposed settlement of the class action was obtained.

Plaintiffs instituted this action in federal district court, alleging that during the period January 1, 1968, to Decem-

ber 31, 1969, defendants violated the federal securities laws in that they failed to disclose or misrepresented facts in prospectuses, registration statements, proxy materials, periodic reports, and releases filed with the Securities and Exchange Commission. Plaintiffs moved for a determination that the suit be maintained as a class action. However, not until nineteen months later, following settlement negotiations, did the district court order the suit to "proceed and be maintained as a class action" for settlement purposes only. The participating litigants also presented the district court with a proposed "notice to class members," the purpose of which was to inform absentee class members of the existence of the class action and the proposed settlement.[1]

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[1] The notice as published in the Wall Street Journal and The Philadelphia Evening Bulletin provided:

Pursuant to Rule 23 of the Federal Rules of Civil Procedure You Are Hereby Notified:

There is pending in this court an action on behalf of purchasers during the period January 1, 1968, to December 1, 1969, of the common stock of Villager Industries, Inc., formerly known as The Villager, Inc. (hereinafter referred to as "Villager"), for damages to such purchasers for alleged violations by defendants of the federal securities laws. It is alleged in the complaint that defendants concealed or misrepresented facts relating to Villager's business in prospectuses, registration statements, proxy materials, periodic reports and releases filed with the Securities and Exchange Commission or the New York Stock Exchange, or distributed to the public, or otherwise, upon which such purchasers relied to their detriment. Defendants deny any of the alleged violations and also deny any liability whatsoever on account thereof, but are agreeable to a settlement of the action upon the terms and conditions described herein in order to avoid further litigation. For the purpose only of effectuating such settlement defendants have agreed to the establishment of a temporary class of claimants as defined herein (hereinafter referred to as the "class").

1. You may be a member of the class, and if so, your rights may be affected by this action and the settlement thereof. This notice, however, is not to be understood as an expression of any opinion by

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Under the terms of the notice, "all persons who purchased shares of Villager during the period January 1, 1968, to December 31, 1969," would be deemed members of plaintiffs' class of stockholders. Membership in the class did not of itself guarantee participation in the settlement, however. In order to participate in the settlement fund, class members were required to file "a verified proof of claim with supporting documents." If such proof were not filed, or if shareholders did not exclude themselves, they were to be "barred from any future recovery on any claim."

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the Court as to the merits of any of the claims, defenses, counterclaims or cross-claims, which have been asserted by any party in this action, as to any participation in the settlement to which any claimant may be entitled, but is given for the sole and exclusive purpose of informing you of the pendency of this action and of the proposed settlement described herein so that you may decide what steps, if any, you wish to take in relation thereto.

* * *

5. Class Defined. The class of persons to whom the settlement is being offered includes all persons who purchased shares of Villager during the period January 1, 1968 to December 31, 1969, and suffered a loss. Excepted from the class are the named defendants. If you purchased shares during the period you will be deemed to be a member of the class unless you take steps provided for herein to exclude yourself.

6. The Settlement. Defendants Norman Raab and Max L. Raab (the "Raabs") have agreed, subject to the approval of the Court, and for a full and final settlement of all claims of members of the class as to all defendants, to make available for distribution to those members who file verified proofs of claim with supporting documents, 660,000 shares of unregistered Villager common stock (hereinafter referred to as the "settlement fund"). The Raabs shall have the option to make 60,000 of said shares available on or before February 28, 1973, or in lieu thereof the sum of $240,000. In addition defendant Norman Raab has agreed to pay counsel fees to plaintiffs' attorneys as counsel for the class in the sum of $300,000 and to pay their out-of-pocket expenses not to exceed $7,500, and to pay the expenses of the settlement.

It is intended that the settlement fund be distributed as follows:

(a) Each claimant who desires to participate in the distribution of the settlement fund shall file a verified proof of claim in the form appended hereto on or before June 30, 1972.

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The district court ordered that notice of the hearing and proposed settlement be made "by publication * * * once a week during the weeks of June 19 and 26, 1972, in the national edition of the Wall Street Journal and in The Philadelphia Evening Bulletin in ⅛ of a page columns." Under the settlement plan, verified proofs or requests for exclusion were required to be filed by August 1, 1972.

On August 31, 1972, the day appointed for the hearing, Burnham appeared in court, presenting a rule to show cause why the hearing should not be adjourned until Sep-

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(b) Each claimant whose claim is accepted shall, depending upon the size and number of the claims made and the further orders of the Court, be entitled to share in the settlement fund in accordance with the following formula: (1) each claimant shall be entitled to receive such share of the settlement fund as equals a fraction, the numerator of which is the recognized loss sustained by claimant, and the denominator of which is the aggregate recognized loss sustained by all claimants whose claims have been accepted, multiplied by the settlement fund; (2) recognized loss shall mean the excess of (a) the total cost of purchase of shares by claimant over (b) the amount realized upon any sales of shares during the period January 1, 1968, to December 31, 1969, and in the case of claimants who held shares on December 31, 1969, the recognized loss shall consist of the excess of (a) the cost of purchase of shares over (b) closing market price of the shares on the date, namely, 7⅝.

(c) No fractional shares shall be distributed to any claimant. None of the named defendants shall be entitled to participate in the distribution of the settlement fund.

The foregoing formula may be modified by the Court in the interests of fairness to all claimants and no claimant shall be entitled to participate in the settlement fund to any greater extent than his actual recognized loss entitles him.

If you are a member of the class, and neither exclude yourself nor file a verified proof of claim with supporting documents, you will be barred from any future recovery on any claims, and shall not receive notice of any further proceedings, hearing or any other matter in connection with such claims, including the entry of a final order dismissing with prejudice any claims you may have as a member of the class.

Under the settlement agreement no distribution will be made until (a) all of the conditions set forth in the settlement agreement have been satisfied, and (b) the Court has approved the settlement and the

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tember 29, 1972, to allow Burnham "to solicit its customers and accounts * * * in order to determine whether such customers and accounts desire to be included in the class" or "have any objections to the proposed settlement," and to permit Burnham "for itself and the various customers and accounts on whose behalf it holds or held shares * * * to file verified proofs of claim and/or requests for exclusion from the class." Du Pont also appeared and moved that the "period for filing verified proofs of claim be extended to September 30, 1972." The district court denied both re-

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distribution to the claimants thereunder, and entered a final order of dismissal with prejudice against the plaintiffs and all other members of the defined class who have not timely excluded themselves, and such order shall have become final either by affirmance or expiration of the time for appeal.

Now Therefore, Take Notice:

1. The Court will exclude you from the class if you request exclusion in writing, on or before August 1, 1972. If you are a member of the class, and do not request to be excluded therefrom, you will be bound to look to the settlement fund only for relief as to any claims which you as a member of the class have against defendants, and will be deemed a party to this action to be included in and bound by any order rendered in connection with this settlement.

2. If you are a member of the class who does not request to be excluded and you wish to participate in the distribution of the settlement fund, you must file, no later than August 1, 1972, a verified proof of claim in the form appended hereto together with your brokers' confirmations of purchase and sale or copies thereof supporting your claim, or you will be forever barred from recovery for any claim you may have against the defendants as a member of the class. Additional forms of proof of claim will be supplied upon written request to the undersigned.

3. If you do not request exclusion, you may, if you so desire, enter an appearance through counsel of your own choosing. If you do not request exclusion, and you do not enter such an appearance your interests in this litigation will be represented by counsel for plaintiffs and the class.

4. If you are a member of the class who does not request exclusion and who does not file a verified proof of claim, you shall not receive notice of any further proceedings, hearings, orders, or any

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quests and entered an order on August 31, 1972, approving the settlement.[2]

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other matters in connection with your claims, including the entry of final order dismissing with prejudice any claim you may have against the defendants, and you shall be bound by all said proceedings, hearings, orders or other matters.

5. A hearing will be held on August 31, 1972, at 10:00 A. M. (D. S. T.) before the United States District Court for the Eastern District, in Court Room ——, United States Courthouse, 9th and Market Streets, Philadelphia, Pennsylvania, on approval of the settlement described herein, at which you may appear and be heard with respect to any of the matters set forth herein.

6. At such hearing no member of the class who desires to object to the settlement will be heard and no papers submitted by or on behalf of any such member will be received or considered by the Court at or in connection with the hearing, except as the Court may in its discretion otherwise direct, unless such member desiring to be heard or to submit papers files with the clerk on or before August 1, 1972, his objections in writing, together with all his papers to be submitted to the Court at the hearing.

[2] *Final Judgment*

And now, this 31st day of August, 1972, after a hearing held on August 31, 1972, pursuant to due notice at which time the parties were heard by their respective counsel, and no persons having appeared in opposition to the proposed settlement, and the Court being fully advised, and the Court having in Settlement Order No. 3 approved the settlement proposed in Settlement Order No. 1 as fair, reasonable and adequate, the Court now enters a Final Judgment in accordance with the Federal Rules of Civil Procedure, as follows:

1. The complaint in this action be, and the same is hereby, dismissed with prejudice. This Final Judgment be, and the same hereby is, in full and final discharge of any and all claims and causes of action against any and all defendants, which have been or might have been asserted with respect to the matters alleged in the complaint.

2. This Final Judgment includes and binds all the members of the class alleged in the complaint in this action, namely, all persons who purchased shares of Villager Industries, Inc., during the period January 1, 1968, to December 31, 1969, and who suffered a loss, except those persons who have requested exclusion.

3. Any and all claims asserted by any parties in this action, whether as a counter-claim or cross-claim or otherwise be, and the same are hereby, also dismissed with prejudice.

4. The settlement proposed in Settlement Order No. 1 shall be consummated in accordance with the Agreement of Settlement and Settlement Order No. 3, and this Court shall retain jurisdiction in this action for the purpose of supervising the consummation of the settlement.

Both appellants filed timely notices of appeal. Additionally, within the appeal period, du Pont unsuccessfully moved before the district court for a stay of the August 31, 1972, order pending appeal to this court. The settlement agreement as approved by the district court provided, in part:

> "11. Settlement shall not become effective, nor be consummated, until a final order has been entered pursuant to paragraph 9 hereof and until the time to appeal from such order has expired and no appeal has been taken therefrom, or if an appeal is taken until such order is finally affirmed on appeal, or the appeal is finally dismissed."

Subsequent to the filing of these appeals, and notwithstanding the above provision, on October 4, 1972, the district court ordered distribution.

I.

We swiftly dispose of appellees' contention that appellants lack standing. Appellants are record holders of the stock. They are at least nominally the legal, if not the equitable, owners of the shares. They were properly the objects of the public notice because they are "persons who purchased shares of Villager during the period January 1, 1968, to December 1, 1969." They appeared at the hearing and presented motions which were denied. They are complaining about exclusion from a class because of improper notice. They are not attempting on this appeal to object to the settlement. As record or legal shareholders they have standing on behalf of the equitable owners of the shares, asserting a wrongful denial of the opportunity to partici-

pate in the class action. See Zients v. LaMorte, 459 F2d 628 (2d Cir 1972); Sertic v. Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America, 459 F2d 579 (6th Cir 1972); Ace Heating & Plumbing Co. v. Crane Co., 453 F2d 30 (3d Cir 1971); Cohen v. Young, 127 F2d 721 (6th Cir 1942).

II.

It was plaintiff-appellees who sought a determination that this litigation be maintained as a class action, pursuant to FR Civ P 23(c)(1),[3] and Rules 23(a) and 23(b)(3).[4] "Plaintiffs' Memorandum in Support of Application for

[3] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

[4] Rule 23(a) provides:

"One or more members of a class may sue * * * as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims * * * of the representative parties are typical of the claims * * * of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b)(3) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"* * *

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Class Action Determination * * *" outlined a procedure for notification of class members ostensibly in compliance with Rule 23(c)(2). Rule 23(c)(2) provides that:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Following recitation of the notice rule, Plaintiffs' Memorandum set forth what must be considered their interpretation of the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Plaintiffs' Memorandum asserted, "Defendant, Villager should be required to furnish whatever information it has from its stock transfer records or stockholder lists which would serve to identify class members. See Herbst v. Able, 47 FRD 11 (SDNY 1969). Cf., Contract Buyers League v. F&F Investment, 48 FRD 7 (ND Ill 1969). Those who cannot readily be identified for the purpose of receiving individual notice, can be notified by publication. Herbst v. Able, supra, as modified in 49 FRD 286 (SDNY 1970)."

But the deed did not match the promise. Notwithstanding plaintiffs' expressed intention to send individual notices to those who could be "readily identified" from Villager's

"stock transfer records or stockholder lists," this was not done. There was but one type of notice: publication in one-eighth page columns in the Wall Street Journal and The Philadelphia Evening Bulletin on two days, June 23 and 30, 1972. This was insufficient notice under any standard of fairness, justice, or due process; it flew in the face of the specific terms of "the best notice practicable" rule; it contravened plaintiffs' stated representation to use individual notice insofar as possible; and it constituted such a defect to the proceedings in the district court that we will not only reverse the district court's orders relating to appellants' requests for extension of time, but we will also vacate the order approving the class action settlement and all orders implementing the settlement.

A.

Because a class action, "so instinct with benefits, is also wrought with mischievous effects,"[5] it is imperative that participating litigants and the court never lose sight of the laudatory fundamental purposes of this procedural device. Its historical purpose was to alleviate the burden on the court and its facilities in cases where a claim was common to a large number of persons. The practice originated in the English Court of Chancery and was assimilated into our judicial system at an early date, largely, it is said, because of the endorsement given it by Justice Storey in his Commentaries. From the equity side of the court, where the doctrines of res judicata are less than clearly defined, class actions gradually found recognition on the law side.

[5] Morris v. Burchard, 51 FRD 530, 536 (SDNY 1971).

Its use in claims for damages is justified where the public policy considerations of efficient court administration outweigh the potential prejudice to persons in interest who are not parties to the proceedings, but who may nevertheless become legally bound by an adjudication as if they were in fact parties litigant.[6]

Also influencing the general acceptance of class actions has been recognition of the fact that the collective or accumulative technique of this device makes possible an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons, were it not for the joinder procedure. The 1966 amendments to Rule 23 are a restatement and reinforcement of public policy, mutually expressed by the Judicial Conference of the United States, its advisory committee on Rules of Civil Procedure, the Supreme Court, and the Congress, which candidly facilitate and encourage the use of class actions. For example, except as otherwise ordered by the court,[7] every potential member of a class is considered to be a member unless he affirmatively seeks exclusion. Rule 23(c)(3).

A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee

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[6] The original class action Rule 23, promulgated in 1937, was a restatement and clarification of Rule 38 of the Equity Rules for Federal Courts (1912).

Absent adequate notice, the rights of many could be at the mercy of a very few. Experience has shown that by comparison to the size of the class, relatively few class members actively participate in the management of the litigation.

[7] In the case at bar, prospective class members were required to perform the affirmative of filing a verified claim.

class member, i.e., "The best notice practicable under the circumstances including individual notice. * * *"

Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound by a final judgment, and that interested parties normally have a real voice in the strategy and management of the litigation, the procedure can be tolerated, if not completely justified,[8] only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice. Responsibility for compliance is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class, for, in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court.[9] The ultimate responsibility of course is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power.

Not the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that ab-

[8] We are not unmindful that after seven years' experience with the 1966 amendments, thoughtful criticisms of the class action device under Rule 23(b)(c) are now emerging with increasing frequency from distinguished members of the federal judiciary who have had vast experience in this field. See Eisen v. Carlisle & Jacquelin, —— F2d ——, —— (2d Cir 1973), "Class actions have sprawled and multiplied like the leaves of the green bay tree." Friendly, Federal Jurisdiction: A General View, Columbia University Press, at 120, "Something seems to have gone radically wrong with a well intentioned effort."

[9] Experience teaches that it is counsel for the class representative, and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry.

sentee class members have knowledge of proceedings in which a final judgment may directly affect their interests. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 314 (1950). In Mullane the Court held that notice by publication failed to satisfy due process requirements since "* * * it is not reasonably calculated to reach those who could be informed by other means at hand." 339 US at 319. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 US at 315. Where names and addresses of members of the class are easily ascertainable, requirements of due process would dictate that the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Rule 23 (c)(2), would be individual notice. See, e.g., Armstrong v. Manzo, 380 US 545 (1965); Schroeder v. City of New York, 371 US 208 (1962); New York v. New York N. H. & H. R. Co., 344 US 293 (1953). In a recent episode of the Second Circuit's continuing saga of Eisen v. Carlisle & Jacquelin, 370 F2d 119 (2d Cir 1966); 391 F2d 555 (2d Cir 1968); and —— F2d —— (2d Cir 1973), it appeared that 2,250,000 members of a 6,000,000 member class could be identified easily. The court stated, "[A]ctual notice must be given

to those whose identity could be ascertained with reasonable effort and that 'in this type of case' plaintiff must pay the expense of giving notice to these members of the class." Eisen v. Carlisle & Jacquelin, supra, —— F2d at ——.

B.

Although the foregoing are principles of general application to class actions, other considerations prompt our strong disaffection for the extremely superficial compliance with these principles which characterizes this case. Although the rules call for the determination of the class action issue "[a]s soon as practicable after the commencement of an action brought as a class action," Rule 23(c), in this case some nineteen months intervened between the filing of the request for designation as a class action and its determination. While there is no impediment to determining class actions for the purpose of settlement only, Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F2d 30 (3d Cir 1971), here the delay accentuated the necessity for adequate notice.[10]

Moreover, the purpose of this notice was to afford a threefold opportunity to absentee class members: (1) to file a claim; (2) to state a desire for exclusion or (3) to object to the settlement. Each of these alternatives is important. Here the claimants were to share in a distribution of stock; the fewer the claimants, the more each would receive.[11] Unlike many class actions, and, indeed, unlike

[10] For dangers associated with class action settlements, see, McGough and Lerach, Termination of Class Actions: The Judicial Role, 33 U Pitt L Rev 445 (1972).

[11] See note 1, supra, ¶6(b), description of the settlement.

the general inclusion provision of Rule 23(c)(3), here the individual participants were required to perform the affirmative act of filing a verified prove of claim by August 1, 1970. This date was within a month of the last publication date. Thus, an uninformed claimant paid a price for non-action.

It is not unusual for objections to be presented at a hearing on a proposed settlement of a class action,[12] and it is elemental that an objector at such a hearing is entitled to an opportunity to develop a record in support of his contentions by means of cross examination and argument to the court. Cohen v. Young, supra, 127 F2d at 724. See also Schwartzman v. Tenneco Manufacturing Co., 375 F2d 123 (3d Cir 1967). Whether the proposed compromise is submitted to the court before or after class action status has been obtained, the court is obliged to determine whether the settlement has been influenced by fraud or collusion and whether it is fair, adequate and reasonable.[13]

Furthermore, we are not unaware that at best the publication procedure utilized was scanty: publication in two newspapers on two occasions seven days apart during the East Coast summer vacation period. Thus, assuming that all possible claimants normally read the Wall Street Journal and The Philadelphia Evening Bulletin—and this is a generous assumption—an absence from home or work dur-

[12] See cases, McGough and Lerach, Ibid., at 463, n 74.

[13] Zerkle v. Cleveland-Cliffs Iron Co., 52 FRD 151 (SDNY 1971); Percodani v. Riker-Maxson Corp., 50 FRD 473 (SDNY 1970); Norman v. McKee, 290 F Supp 29 (ND Cal 1968), affd, 431 F2d 769 (9th Cir 1970); Roman v. Master Industries, Inc., CCH Fed Sec L Rep [1966-67 Transfer Binder] ¶91,806 (SDNY 1966); Neuwirth v. Allen, CCH Fed Sec L Rep [1961-64 Transfer Binder] ¶91,324 (SDNY), affd, 338 F2d 2 (2d Cir 1964).

ing this period, or any departure from normal habits during this critical seven-day period, would have lessened the probability of the claimant's receiving notice. Appellees contend that since appellants are stockbrokers they should be held to know the contents of the Wall Street Journal. Although we can agree that there is a reasonable probability that appellants' personnel read this publication regularly, this argument misses the point. The issue raised by appellants affects the notice to *all* potential members of the class, not only the appellants. In our view, the vice of inadequate notice makes it impossible for any court to determine whether an interested and uninformed absentee would have raised an objection to the settlement, elected to file a verified proof of claim, or opted for exclusion.[14]

This, too, must be said. We have a serious problem with the limited period of time in which the shareholders were permitted to file proofs of claim or requests for exclusion. As the Supreme Court has recognized, the opportunity to be heard, a fundamental requisite of due process, is of "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., supra, 339 US at 314. It is clear therefore that the notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms. As a consequence, just as a hearing which does not afford a meaningful opportunity

[14] For a complete exposition of the notice requirements of Rule 23 and related issues, see generally Symposium, Federal Rule 23—The Class Action, 10 BC Ind & Com L Rev 497 (1969). See especially Ward & Elliott, The Contents and Mechanics of Rule 23 Notice, 10 BC Ind & Com L Rev 557 (1969).

to be heard may be as fatal to due process as a denial of any hearing at all, so too constitutionally mandated notice which is inadequate under the circumstances may be as fatal to due process as no notice at all. Moreover, pro forma gestures will not suffice. The notice must not only convey the required information, but, synthesizing from the Supreme Court's own language, it must also "afford a reasonable time for those interested to choose whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., supra, 339 US at 314. Appellants present a reasonable argument that the thirty-day period was insufficient for those members of the class who had left their stock in street names with their stockbrokers. A one-month period hardly seems sufficient time for brokerage firms to search their records, notify customers, probably by mail, for whom they held shares in street name, receive instructions from these customers, again probably by mail, and file the proofs of claim or requests for exclusion.

III.

Finally, appellees contend that the issue is moot because the settlement has been approved and the stock distributed. Additionally, they contend appellants are foreclosed from prosecuting this appeal because they failed to obtain a stay of the district court's order by this court. This contention borders on the frivolous. We were told at oral argument by appellants that had their motion for a stay been granted by this court, appellees had indicated to them that they would have asked this court to set a bond of eleven million dollars.

That the stock has been distributed in accordance with the district court's order is immaterial. The distribution

of that stock, pursuant to the settlement agreement, made at a time when these appeals were under way, was in direct contravention of paragraph 11 of the settlement agreement which states that the settlement would not "become effective, nor be consummated * * * if an appeal is taken until such [settlement] order is finally affirmed on appeal, or the appeal is finally dismissed." With full knowledge of the pendency of these appeals, and presumptively with knowledge of the effect of the appeals as a bar to consummation of the settlement agreement which appellees participated in negotiating, appellees, jointly or severally, persuaded the district court to order distribution. Both appellees took this step with full cognizance of the risk involved.

The matter is not moot. We hold that because the notice was fatally defective, all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to those proceedings will therefore be vacated.

The judgment of the district court will be reversed and the proceedings remanded for further proceedings not inconsistent with this opinion.

SUPREME COURT, U.S.
SEP 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

PETITIONER'S REPLY BRIEF.

This reply brief is filed in response to Respondents' Supplemental Brief, the sole purpose of which is to call the Court's attention to the decision in *Greenfield v. Villager Industries, Inc.*, 17 Fed. Rules Serv. 2d 577 (3d Cir. 1973), reh. den. and reh. *en banc* den. (July 27, 1973).[1] Respond-

1. Respondents ostensibly rely on Rule 24(5) which permits a supplemental brief "at any time while a petition for a writ of certiorari is pending calling attention to new cases . . . not available at the time of his last filing." The *Greenfield* decision was reported in the July 11, 1973 issue of the CCH Federal Securities Law Reporter, seven weeks before Respondents' Brief in Opposition to the Petition was filed.

ents have printed a copy of the decision in the appendix to their Supplemental Brief, but failed to include the opinion of Judge Adams dissenting from the denial of rehearing. A copy of Judge Adams' opinion is printed in the appendix hereto. It supports Petitioner's submission here as follows:

> "More important though, at least for me, is the implication of the panel decision regarding notices in the future insofar as cases arising from stock transactions are concerned. There is some danger that the opinion may be interpreted to mean that individual notice must always be required in such situations. Yet, whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all of the countervailing factors. Although a district judge might well have provided for wider publication, or a greater time period for filing claims or for opting out of the class, or even insisted on individual notices, the critical question is whether it is an abuse of discretion when the district judge does not do so. The record would not appear to support a conclusion that the district court here did, in fact, abuse his discretion." (5 psa)

Judge Adams' view accords with that of the Third Circuit in *Katz v. Carte Blanche Corporation,* No. 72-1054 (May 22, 1973) (rehearing pending), printed in the appendix to the Petition for a Writ of Certiorari, at 136a *et seq.* Judge Adams' dissent, coupled with the opinion in

Katz, underscores, as does the conflict within the Second Circuit itself, the need for this Court to resolve the significant issues raised by the *Eisen* petition.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1998 and 72-1999

RICHARD D. GREENFIELD and SAMUEL MOSHINSKY, on behalf of themselves and all others similarly situated,

v.

VILLAGER INDUSTRIES, INC., NORMAN RAAB, KRISTINE RAAB, MAX L. RAAB, MARY L. RAAB, ALAN E. SALKE, WILLIAM B. EAGLESON, JR., THOMAS E. FEELEY, HERBERT J. GOODFRIEND, and CLARENCE RAINESS & COMPANY, DUPONT GLORE FORGAN INCORPORATED,
one of the class of plaintiffs above-named,
Appellant in No. 72-1998.

BURNHAM & COMPANY, INC., etc.,
Appellant in No. 72-1999.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
ALDISERT,
Circuit Judge.

Dated: July 27, 1973.
JUDGE ADAMS dissents.

ADAMS, *Circuit Judge,* Dissenting Sur Denial of Petition for Rehearing.

I respectfully dissent from the order denying rehearing in this case, because I believe that the petition presents a serious question regarding "notice" in connection with proposed settlements of class actions. Also, it addresses important problems relating to standing and the nature of relief when notice is deemed by an appellate court to be inadequate.

The settlement here was reached by the named plaintiffs and Villager. It provided that 660,000 shares of Villager stock was to be made available for distribution to those who had purchased Villager stock in 1968 and 1969, the period during which fraudulent statements regarding the company were allegedly made.

Plaintiffs had sought to have the matter declared a class action under Rule 23(c) on November 13, 1970, an early stage of the litigation, but the district court deferred making the necessary determination. When the proposed settlement developed, the plaintiffs again requested the district court to declare the matter a class action. Although in their petition for class determination plaintiffs had offered to send individual notices, predicated on an

appropriate list being prepared and submitted by Villager, the district court entered an order on June 7, 1972, providing that notice by publication would be sufficient under Rule 23(c)(2). Also, the class was to consist of "purchasers" during 1968 and 1969. Publication appeared on June 23 and June 30, 1972, in both the Philadelphia Evening Bulletin and Wall Street Journal. It provided for a cut-off date of August 1st for the filing of all claims or the filing of an election to be excluded from the class, or for filing objection to the settlement; and for a hearing on August 31, 1972, to determine whether the settlement was fair and reasonable and should be approved. The August 1st deadline was later extended to August 23, 1972.

On August 31, 1972, Burnham & Co. and duPont Glore Forgan, two large and widely-known brokerage firms, presented a rule to adjourn the hearing in order to permit additional time to solicit and file claims on behalf of individual customers of these firms who may have purchased Villager stock during 1968 and 1969, but kept such stock in street name. Specifically, Burnham and duPont sought extensions of time until the end of September, 1972, to file claims on behalf of their customers. At the hearing it was made clear that duPont and Burnham had learned of the proposed class settlement by the latter part of July. No explanation was given by them as to why they did not request an extension, *at that time,* before the deadline fixed by the court. They did explain that it would take a number of weeks to ascertain the names of their customers who may have bought Villager stock in 1968 and 1969. An affidavit filed by Burnham on August 31, 1972, stated that "because of an error in a computer run and because of the number of customers and transactions involved" it had taken several weeks to obtain the information. DuPont did not file an affidavit, but at the hearing on August 31,

1972, its counsel stated that there had been a delay caused because of recent mergers and the fact the material was in a warehouse.

Claims representing 11,000,000 shares of Villager stock had apparently been filed by the deadline. Also, customers of Burnham had sent in a substantial number of verified claims within the time designated by the district judge.

There was no suggestion at the hearing before the district court that the settlement had been influenced by fraud or collusion, that it was not fair, or that it was unreasonable. Indeed, on August 31, 1972, the day the district judge approved the settlement in open court, counsel for duPont and Burnham were present in the courtroom and did not object to the settlement.

The notices of appeal filed by Burnham and duPont indicate that these companies were appealing primarily from the failure of the district court to extend the period of time for filing claims for their customers, or opting out of the settlement.

After the appeals were filed, Burnham and duPont sought a stay of the distribution of the Villager stock. This was denied by the district court on October 4, 1972. Burnham and duPont did not apply to this Court for a stay of the distribution.

Under the circumstances, there would seem to be considerable question whether Burnham and duPont have standing to assert claims regarding the nature of the notice of the class action settlement or regarding the order of the trial judge in refusing to grant additional time for filing notice of claims or for opting out. The real injury caused by the nature of the notice or the failure to extend the time, is suffered by their customers. And in any event, Burnham and duPont would not appear to have standing

to complain on this appeal about the nature of the notice since the specific complaint pressed by them before the district court was not addressed to the nature of the notice (publication rather than individual notification) but to the district court's refusal to extend the time.

More important though, at least for me, is the implication of the panel decision regarding notices in the future insofar as cases arising from stock transactions are concerned.[1] There is some danger that the opinion may be interpreted to mean that individual notice must always be required in such situations. Yet, whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all of the countervailing factors. Although a district judge might well have provided for wider publication, or a greater time period for filing claims or for opting out of the class, or even insisted on individual notices, the critical question is whether it is an abuse of discretion when the district judge does not do so. The record would not appear to support a conclusion that the district court here did, in fact, abuse his discretion.[2]

Finally, I am troubled by the sweep of this Court's judgment, which vacates the entire settlement, even though no party has requested such drastic action, or even objected to the settlement as such. Restructuring a settlement in-

1. *See* Eisen v. Carlisle & Jacquelin, No. 72-1521 (2d Cir. filed May 1, 1973), *rehearing denied*, May 24, 1973.

2. Since, at the hearing on August 31, 1972, Burnham and duPont requested only an extension of time to file claims or elections, and did not at that time ask for a new notice procedure to include individual notices, the charge of abuse of discretion by the district court should be addressed to the district court's order denying the extension of time.

volving a volatile stock, such as Villager, may be most difficult and even inequitable at this late date. Would it not be more appropriate, assuming it is determined that there are some purchasers of the stock within the two-year period who have not yet asserted claims, to remand this particular problem to the district court, who, after hearing from counsel, might well permit such purchasers to recover on a pro rata or some other equitable basis if they now come forward and establish their claims. It is conceivable, I suppose, that there might be very few such stockholders. To strike down the entire settlement because of the possibility of a few such stockholders may be punitive for individual members of the class who in no way actively participated in formulating the notice or in deciding to proceed with the distribution. The matter might be more susceptible to a solution aimed at the specific problem, whether that problem is considered in terms of an additional 30 days to file claims or the lack of individual notice to purchasers of Villager stock during 1968 and 1969.

The ordering of distribution by the district court before the appeal is somewhat troublesome. However, it may be that such step was taken by the district court on the premise that if there were a reversal on his ruling not to extend the period for filing by Burnham and duPont stockholders for approximately a month, the harm caused by the early distribution could be rectified by specific awards, such as suggested above, or by permitting such purchasers to assert their claims by separate suit. Admittedly, the record is not clear on the distribution point, but a hearing on remand would undoubtedly clarify it.

For the foregoing reasons I believe the petition for rehearing should be granted to permit a full exploration of the problems posed by the appeal.

COURT, U. S.

FILED

NOV 29 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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THE OPINIONS DELIVERED IN THE COURTS BELOW.

1. The opinion of the Court of Appeals of May 1, 1973, reversing the orders of the district court (Medina and Lumbard, Senior Circuit Judges, per Medina, J.) is reported at 479 F. 2d 1005 (A346). The opinion of Judge Hays, concurring in the result is reported *id.* at 1020 (A374).

2. The opinion of the Court of Appeals of May 24, 1973 denying rehearing in banc is reported *id.* at 1020-1 (A375). The concurring opinion of Judge Mansfield is reported *id.* at 1021 (A377). The dissent of Judge Hays is reported *id.* at 1021 (A377). The dissent of Judge Oakes (Judge Timbers concurring) is reported *id.* at 1021 *et seq.* (A377).

3. Prior opinions of the Court of Appeals are reported at 370 F. 2d 119, *cert. denied,* 386 U. S. 1035 (A104), and 391 F. 2d 555 (A110).

4. The opinions of the District Court are reported at 41 F. R. D. 147 (A93); 50 F. R. D. 471 (A164); 52 F. R. D. 253 (A199); and 54 F. R. D. 565 (A275).

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1973. A timely petition for rehearing, containing a suggestion that the action be reheard in banc, was filed on May 11, 1973, and was denied on May 24, 1973. This Court granted certiorari on October 15, 1973. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa (the "Exchange Act"), and 28 U. S. C. §§ 1291 and 1292(b).

The text of Rule 23 is as follows:

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the oppor-

tunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
As amended Feb. 28, 1966, eff. July 1, 1966.

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The texts of the Fifth Amendment and the statutory provisions are printed in an Appendix at the end of this Brief. (Page references to that Appendix are designated —a.)

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals have jurisdiction to review the orders of the District Court allowing the action to be maintained as a class action and allocating the cost of notice?

2. Must a class action otherwise maintainable under Rule 23 be dismissed because the individual class representative cannot afford to pay for individual notice of its pendency to more than two million identifiable class members?

3. Is individual notice to more than two million identifiable class members required by due process or Rule 23, where the statute of limitations has run on the damage claims of the individual members, so that their interest in electing exclusion from the class is minimal?

4. Is due process satisfied in a class action maintained under Rule 23 by adequacy of representation, published notice and representative individual notice, rather than requiring individual notice to every identifiable class member?

5. Is notice of the pendency of a class action required in a class action maintained under Rule 23(b)(1) or (2)?

6. Does Rule 23 or due process preclude the District Court from allocating the cost of the class action notice among the parties, on the basis of the high probability of plaintiff's success on the merits, as determined in a preliminary evidentiary hearing?

7. Did the Court of Appeals err in holding as a matter of law that the class action was unmanageable?

8. Did the Court of Appeals err in rejecting out-of-hand a possible form of class action relief under which

defendants might be required to disgorge the fruits of their antitrust and Exchange Act violations under the so-called "fluid recovery" theory?

9. Did the Court of Appeals apply an improper standard of review in usurping the District Court's broad discretion in making a class action determination under Rule 23?

STATEMENT OF THE CASE.

Petitioner seeks review of the decision and opinion of the United States Court of Appeals for the Second Circuit, dated May 1, 1973, reversing the class action orders of the District Court, and dismissing the case as a class action.

The Complaint.

The complaint alleges that in the period 1962-1966 the two odd-lot brokerage firm defendants (Carlisle & Jacquelin and DeCoppet & Doremus, hereinafter "the odd-lot defendants"), who controlled ninety-nine percent of the odd-lot business, illegally fixed the odd-lot differential charged to the investing public at an excessive level in violation of the federal antitrust laws, and that such price-fixing was done with the acquiescence of the defendant New York Stock Exchange (hereinafter the "Exchange") in disregard of its regulatory and fiduciary duties to investors, in violation of the Securities Exchange Act of 1934 ("Exchange Act").[1] The Complaint requests treble damages and injunctive relief for defendants' antitrust violations, and damages and injunctive relief against the Exchange for violation of the Exchange Act. The District Court's jurisdiction was based on 28 U. S. C. § 1337. The action arises under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and under Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(f) and 78aa.

1. Odd-lots are shares traded in lots of less than a hundred. Shares traded in multiples of a hundred are round lots. During the period 1962-1966 the odd-lot differential (a surcharge imposed on odd-lot transactions in addition to the standard commission) was 12½ cents per share on all stocks selling below $40 per share and 25 cents per share on all stocks selling at or more than $40 per share; on July 1, 1966 the "break point" was raised to $55 per share.

The Class Action.

The action was brought on May 2, 1966 as a class action on behalf of all persons who were forced to pay the differential. On September 27, 1966, the District Court dismissed the action as a class action (A93). Plaintiff appealed the dismissal to the Court of Appeals for the Second Circuit. Defendants' motion to dismiss the appeal as not being taken from a final order was denied, on the ground that dismissal of the class action was the "death knell" of the entire action, since for all practical purposes it would terminate the litigation, because plaintiff's individual stake, $70, was so small (A104). This Court denied certiorari. 386 U. S. 1035. By opinion dated March 8, 1968, the Court of Appeals reversed the District Court's original dismissal of the action as a class action and held that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)[2] except that a further evidentiary hearing was required with respect to the issues of "notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper" (A133). The case was remanded with directions to hold such a hearing. The Court of Appeals stated:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (A112).

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2. The Court of Appeals held that the class action was not maintainable under Rule 23(b)(1) or (b)(2).

The Court further stated:

> ". . . courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants." (A127).

Moreover, the Court held that Rule 23 "should be given a liberal rather than a restrictive interpretation." (A119).

The District Court Hearings on Remand.

On remand the District Court held two sets of hearings. The first dealt with whether the case could be maintained as a class action. On the basis of a complete record, in which most of the facts were stipulated, the District Court held that the prerequisites to maintenance of a class action were satisfied.

The District Court, heeding the Court of Appeals' admonition that Rule 23 was intended "to provide a thoroughly flexible remedy" stated that: "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof . . .", deeming it "appropriate . . . to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial planning stage, an inflexible mold of recovery running to specific class members." "Fluid recovery" would be accomplished by establishing a fund equivalent to the amount of unclaimed damages and reducing the odd-lot differential on future transactions in an amount determined reasonable by the Court until the fund was depleted. The District Court emphasized, however, that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for

distribution of the unclaimed remainder." (A217). The District Court also found, by analyzing the record in other class actions, that the expense of administration would not engulf the prospective recovery (A217-8).

The Class Notice.

The District Court held that the requirements of due process and Rule 23(c)(2) would be satisfied by publication in the national edition of the Wall Street Journal and in New York, San Francisco and Los Angeles newspapers, supplemented by mailing of an initial individual notice to the most active members of the class, followed by more extensive notice in the event that the defendants were found liable. The court accordingly ordered individual notice to be sent "to the approximately 2,000 or more class members who had ten or more transactions during the relevant period."[3] This notice program was tailored to the Court of Appeals' suggestion that the notice effort should be concentrated upon those class members who may have "enough of a stake in the proceedings to justify personal intervention . . ." (A132). The District Court further directed: "In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5 000 other class members selected at random from the 2,000,000 persons and firms who are identifiable." In addition, the District Court noted that plaintiff had offered to send copies of the notice to all member firms of the Exchange and to all commercial banks with large trust departments. Plaintiff also suggested that the notice could be included in the confirmations and monthly statements sent to their customers by the member firms.

3. This figure was based on a representative sample of four of the fourteen wirehouses which had such tapes.

Having decided that the requirements of Rule 23 for maintenance of a class action were satisfied, the District Court proceeded to determine who should bear the cost of notice to the class, reasoning: "If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, Eisen II at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim" (A225-6). As a solution the court held a preliminary hearing for the purpose of determining whether plaintiff's chance of success on the merits was sufficient to justify imposing the cost of notice on the defendants.

The Evidence of Defendants' Liability.

On the basis of a record, most of which consisted of the defendants' own documents which they put in evidence themselves, the District Court found that plaintiff and the class "are more than likely to prevail at trial or upon a motion for summary judgment" (A289-90). The court found that plaintiff had made a strong showing that the odd-lot defendants had engaged in price fixing, market division, and other anti-competitive practices, none of which was exempt from the antitrust laws. Counsel for the odd-lot defendants admitted that the differential was the result of "most intense negotiation between the odd-lot houses among themselves. . . ." (A274). The two firms always charged exactly the same differential, and when the differential was changed, each firm changed it identically at the identical moment. They claimed that they were entitled to "a special exception" that made compliance with the fed-

eral antitrust laws unnecessary. The District Court found that no special exception was warranted. Indeed, no such defense had been pleaded.

The District Court likewise found that the plaintiff had presented "excellent evidence" of liability against the Exchange, resulting primarily from the Exchange's failure to prevent the odd-lot defendants from charging their excessive differential to the public (A289). Accordingly the District Court imposed 90% of the total notice cost of $21,720 on the defendants (A290).

The Court of Appeals Decision.

Following the District Court's order allocating ninety percent of the cost of notice to them, the defendants obtained an order from the Court of Appeals on May 1, 1972 (over plaintiff's objection that the Court of Appeals had no jurisdiction to enter such an order) directing the Clerk of the District Court to certify and transmit the record for review (A314). Thereafter, defendants also filed a notice of appeal from the orders of the District Court (A315). Plaintiff moved to dismiss the appeal as not being taken from a final order. The motion was denied on June 29, 1972 (A317).

On May 1, 1973 the Court of Appeals (Medina and Lumbard, Senior Circuit Judges; Hays, Circuit Judge, concurring in the result) reversed the orders of the District Court which had sustained the prosecution of the case as a class action, and dismissed the case as a class action.

The Court of Appeals held:

1. It had jurisdiction to review the order of the District Court, because all orders sustaining class actions are appealable (A348).

2. In virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3)—and whether plaintiff's claim appears to be meritorious or not—plaintiff must send and pay for individual notice to every class member who can be identified (A364).

3. The District Court has no discretion under Rule 23 to fashion an equitable remedy appropriate to the kind of wrong and the type of class involved; hence, even the theoretical possibility of a "fluid class" recovery was rejected (A370).

4. In addition to rejecting the "fluid class theory", the Court held the class action unmanageable, even though 56% of the challenged transactions are recorded on computer tapes, so that class members could be repaid directly and precisely with regard to those transactions (A367, A184-5).

5. Any kind of newspaper notice is "a farce" (A368-9); due process and Rule 23 require that every class member must receive individual notice of the pendency of the action.

6. The merits of the case are irrelevant; no matter how apparent and gross the wrong, a class action cannot be maintained unless plaintiff first gives and pays for individual notice pursuant to Rule 23(c)(2). The District Court has no jurisdiction either to evaluate the merits of plaintiff's claim to allocate the cost of notice (A367).

Judge Hays concurred in the result, "unable to accept the ruling of the district court requiring the defendants to pay ninety percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure." Judge Hays was presumably referring only to the notice as ordered by the District Court. He did not join the majority in holding that 2,000,000 individual notices were required (A374).

The Petition for Rehearing in Banc.

Plaintiff petitioned the Court of Appeals for a rehearing in banc. Five members of the Court (per Judge Kaufman with Judges Friendly, Feinberg, Mansfield and Mulligan concurring) voted to deny rehearing only because "the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. . . . [W]e wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." (A376).

Judges Hays, Oakes and Timbers voted for a rehearing in banc. Judge Oakes (with Judge Timbers concurring) filed an opinion which states:

1. "The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens." (A378).

2. "The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23." (A378).

3. "The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer." (A379).

4. Notice by publication is not "a farce", but is rather, "highly effective" (A384).

5. The panel opinion "not merely ossifies, but destroys" class actions, an important remedial device. (A384).

SUMMARY OF ARGUMENT.

The Court of Appeals had no jurisdiction to review the orders of the District Court permitting Petitioner to maintain this action as a class action, and prescribing the form and allocating the cost of notice to the class. Having previously reversed the District Court's order dismissing the class action and remanded the case, the Court of Appeals relinquished jurisdiction. It could not "retain" jurisdiction or regain jurisdiction in the absence of a final order of the District Court or a properly certified interlocutory appeal. There was neither a final order, nor a certification. By holding that all class action determinations are appealable, the Second Circuit invites a further increase in the already inordinate burdens on the Courts of Appeals.

Fundamental principles of public policy support maintenance of this class action. Petitioner serves as a "private attorney general" in vindicating the policies of antitrust and securities law enforcement, including the policy that wrongdoers shall not retain the fruits of their violations. Injury to the class arising from violation of those laws can be effectively redressed only by recourse to Rule 23, where the claims are too small to warrant individual litigation.

The Court of Appeals erred in holding that individual notice is required to more than 2,000,000 identifiable class members and that Petitioner must pay for such notice, or suffer dismissal of the class action. Due process does not require individual notice at every step in class actions, but rather is satisfied by fairness and adequacy of representation, with such notice as is reasonable under the circumstances. The District Court found that plaintiff would fairly and adequately represent the class, a finding which the Court of Appeals did not disturb.

Rule 23(c)(2) prescribes "the best notice practicable under the circumstances including individual notice to all

members who can be identified through reasonable effort," in 23(b)(3) class actions. Such determinations lie within the sound discretion of the District Court, which was not abused in this case. The class action is also maintainable under 23(b) (1) or (2), for which no notice requirement is prescribed by the Rule. The notice prescribed by the District Court, including publication and selected individual notice satisfied the requirements both of due process and Rule 23.

At this stage of the case, for the purpose of determining the underlying common questions of liability, which the Court of Appeals has held are predominant within the meaning of Rule 23(b)(3), individual notice to every identifiable class member is not essential. The principal purpose of such notice is to give class members an opportunity to "opt out" of the class, so as not to be bound by the judgment. Since the Court of Appeals has found that their interest in electing exclusion from the class is minimal, because, among other reasons, the statute of limitations has run on damage claims of the individual class members, individual notice is not important at this juncture. If liability is determined in favor of the class, broader notice can be given to individual claimants.

Rule 23 provides that the court, not the parties, shall direct notice to the class. It does not impose that burden on the class representative, nor does it provide that ability to give notice is a prerequisite to maintenance of a class action. The Court may allocate the cost of notice among the parties. The preliminary evidentiary hearing held by the District Court to determine Petitioner's probability of success on the merits was an appropriate way of determining the allocation and did not violate due process. If Respondents are found liable, the cost of broader notice to elicit claims of class members can be imposed on them.

The Court of Appeals erred in holding that the class action is unmanageable. The District Court correctly held that the class action is manageable and that the likely recovery will not be overwhelmed by costs of administration. The District Court contemplated that claims of individual class members would be satisfied to the extent filed, but also properly held that a "fluid recovery" remedy could be considered, whereunder damages not individually claimed could be used to reduce the odd-lot differential in the future for the benefit of odd-lot traders. While "fluid recovery" was not ripe for determination on appeal, since it was only tentatively proposed by the District Court, its ultimate adoption would fall within the equity powers of the court. It is appropriate as a form of relief both under the Clayton Act and the Exchange Act. The Court of Appeals erred in holding that it violates due process and is "illegal."

The Court of Appeals erred in usurping the District Court's broad discretion.

ARGUMENT.

I. The Court of Appeals Had No Jurisdiction to Review the District Court's Orders Permitting the Action to Be Maintained as a Class Action.

The 1968 opinion of the Court of Appeals, reversing dismissal of the class action, concludes:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." (A133).

On March 8, 1968, the following judgment was entered by the Clerk of the Court of Appeals:

> ". . . it is now hereby, ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant." (A138).

The mandate was issued on April 9, 1968. The District Court held the hearings required by the Court of Appeals and reinstated the class action which it had originally dismissed. Thereupon, Respondents moved in the Court of Appeals for an order directing the Clerk of the District Court to certify and transmit the record for review, claiming that the Court of Appeals, having "retained" jurisdiction, had authority to so order (A309).

The motion was granted over Petitioner's objection that the Court of Appeals had relinquished jurisdiction when it reversed and remanded (A314).

Respondents also filed a notice of appeal under 28 U. S. C. § 1291(a) from the orders of the District Court of April 7, 1971 and April 4, 1972 ,which allowed the class action and allocated the cost of notice (A315). Petitioner moved to dismiss that appeal on the ground that it was not taken from a final order (A317). The motion was denied (A322).

In its opinion on the merits, reversing the above orders of the District Court, the Court of Appeals stated: ". . . in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met." (A367).

(a) The Court of Appeals Had No "Retained" Jurisdiction.

The words "we retain jurisdiction" in the opinion could not and did not effectively preserve the jurisdiction of the Court of Appeals, in face of the court's own judgment that the order of the District Court had been reversed and the case remanded, and the return of the mandate to the District Court. Once an appellate court affirms or reverses the lower court's decision and sends down its mandate, "[t]he case is no longer in this court." *In re Nevada-Utah Mines & Smelters Corp.*, 204 Fed. 982, 983 (2d Cir. 1913), and "the Court's control over the judgment below comes to an end", *Meredith v. Fair*, 306 F. 2d 374, 376 (5th Cir. 1962).

The practicalities support these holdings. Respondents argued that the Court of Appeals could somehow re-

serve jurisdiction in 1968 to hear an appeal that might be presented to it many years in the future from orders of the District Court that had not yet been made. Since jurisdictional statutes are strictly construed, *Bohms v. Gardner*, 381 F. 2d 283 (8th Cir. 1967), *cert. denied*, 390 U. S. 964 (1968), appellate jurisdiction cannot be based on such speculative grounds.

Reversal and remand of the case is inconsistent with retention. The Court of Appeals, in the opinion now under review, expressly recognized that it had intended "to relinquish jurisdiction . . . to decide if the requirements of amended Rule 23 had been met."[4] (A367).

(b) The Court of Appeals Had No "Final Order" Jurisdiction.

With one narrow exception,[5] the Courts of Appeals which have considered the question, including the Second Circuit prior to the *Eisen* decision now under review, have been unanimous that class action determinations are not final orders, and are not subject to interlocutory appeal, absent certification under 28 U. S. C. § 1292(b). *Weight Watchers of Philadelphia v. Weight Watchers International*, 455 F. 2d 770 (2d Cir. 1972); *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *City of New York v. International Pipe & Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1970); *Caceres v. International Air Transport Associa-*

4. The anomaly created by the Court of Appeals "retaining" jurisdiction is evidenced by Respondents' characterization of themselves in their Brief in that Court as "Defendants-Appellees." They had been Appellees in 1968. But surely, when the District Court decided against them on remand, they were no longer Appellees in seeking reversal.

5. The exception was created by the Second Circuit's holding on the first *Eisen* appeal (Eisen I), from dismissal of the class action, that the appeal would be allowed where its denial meant the "death knell" of the action (A104).

tion, 422 F. 2d 141 (2d Cir. 1970); *Hackett v. General Host Corp.,* 455 F. 2d 618 (3d Cir.), *cert. denied,* 407 U. S. 925 (1972); *Graci v. United States,* 472 F. 2d 124 (5th Cir. 1973); *Songy v. Coastal Chemical Corp.,* 469 F. 2d 709 (5th Cir. 1972); *Gosa v. Securities Investment Co.,* 449 F. 2d 1330 (5th Cir. 1971); *Lamarche v. Sunbeam Television Corp.,* 446 F. 2d 880 (5th Cir. 1971); *Walsh v. City of Detroit,* 412 F. 2d 226 (6th Cir. 1969); *Falk v. Dempsey-Tegeler & Co., Inc.,* 472 F. 2d 142 (9th Cir. 1972); *Weingartner v. Union Oil Company of California,* 431 F. 2d 26 (9th Cir. 1970) *cert. denied,* 400 U. S. 1000 (1971).

Rule 23(c)(1) provides: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Rule 23(d) provides: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action that notice be given in such manner as the Court may direct to some or all members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action; . . . The orders may be combined with an order under Rule 16, and may be amended or altered as may be desirable from time to time." The Advisory Committee commented as follows: "A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound." 39 F. R. D. at 104.

Thus, an order sustaining a class action is tentative, and not a final order, *Walsh v. City of Detroit, supra.* Rule 23 expressly contemplates continuing jurisdiction and dis-

cretion in the District Court, dispelling any notion that a class action order is final.[6]

Against this unanimity of authority, the Court of Appeals in *Eisen* held the orders of the District Court appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), concluding that: "An order sustaining a class action allegation clearly involves issues 'fundamental to the further conduct of the case;' . . . the order is also separable from the merits of the case. . . ." The holding invites appeals in every class action, imposing a great new burden on the beleaguered Courts of Appeals.[7]

This Court held in *Cohen, supra,* that 28 U. S. C. § 1291 does not permit appeals from decisions "where they are but steps towards final judgment in which they will merge . . . . [and are not] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546. The Court

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6. In *City of New York v. International Pipe & Ceramics Corp., supra,* the Second Circuit dismissed as interlocutory an appeal from an order denying class action status. The cases were then transferred to the United States District Court for the Eastern District of Pennsylvania, which ordered that the actions could proceed as class actions. Defendant sought to challenge the order by writ of mandamus, which was denied by the Third Circuit, *Interpace Corporation v. City of Philadelphia,* 438 F. 2d 401 (3d Cir. 1971), relying on the provision of Rule 23(c)(1), that a class action order may be altered or amended before the decision on the merits. See also *Gerstle v. Continental Airlines, Inc.*, 466 F. 2d 1374, 1377 (10th Cir. 1972).

7. By June 30, 1973, a total of 10,456 cases were on the dockets of the Courts of Appeals, 245% above the 1962 level of 3,031 cases. On a per judgeship basis, national filings have increased 96% over 1966 and nearly 200% over 1961. *1973 Annual Report of the Director,* Administrative Office of the United States Courts, pp. II-4, II-42.

further stated: "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." 337 U. S. at 546.

Since its May 1, 1973 decision in *Eisen*, another panel of the Second Circuit has held: "The final judgment rule is designed not merely to prevent an appeal on an *issue* concerning which the trial court has not yet made up its mind beyond possibility of change but also to eliminate the need for separate appellate consideration of different elements of a single claim. The burgeoning loads of the courts of appeals mandate strict adherence to this salutary policy." *Cinerama, Inc. v. Sweet Music, S. A.*, 482 F. 2d 66, 70 (2d Cir. 1973). Under these standards the orders sustaining the class action were not appealable.

The District Court's order that Respondents pay ninety percent of the cost of notice to the class is no less a "step towards final judgment" than, and no different in its effect from, an order refusing to vacate an attachment, which the Second Circuit has consistently held to be interlocutory and not appealable even though the damages could well exceed the attachment bond. *West v. Zurhorst*, 425 F. 2d 919 (2d Cir. 1970). *Cf. Financial Services, Inc. v. Ferrandina*, 474 F. 2d 743 (2d Cir. 1973). Many interlocutory rulings may appear momentous when made, in their relationship to the future conduct of a particular lawsuit or in the burdens or disadvantages they impose on a party. Those considerations do not make such rulings appealable of right.[8] Adequate alternative appellate remedies, which they chose to

8. In *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, *rehearing denied*, 410 U. S. 975 (1973), Hughes argued in its petition for certiorari that compliance with the discovery order of the District Court would have cost $5,000,000. It suffered a

ignore, were available to Respondents, including application for certification under the Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b), or mandamus. Unchecked expansion of the Cohen doctrine is especially unnecessary in view of such post Cohen alternatives. See *Hackett v. General Host Corporation, supra,* 455 F. 2d at 624.

Indulging Respondents in piecemeal review has enabled the Court of Appeals to make sweeping statements on issues not ripe for review. For example, it has rejected out of hand any possibility of "fluid class recovery", a remedy which the District Court had not definitively decided to apply, but rather kept open, so that the court would not "... adopt, at this initial, planning stage, an inflexible mode of recovery running to specific class members." The District Court recognized that: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder."

The appellate jurisdiction of the Court of Appeals should be restored to its proper bounds. Its decision reversing the orders of the District Court sustaining the class action should be set aside.

II. Compelling Principles of Public Policy Sustain Petitioner's Right to Maintain This Action as a Class Action.

In the debates preceding enactment of the Clayton Act, Senator Borah said: "There could be no safer guardian for

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8. (Cont'd.)

default judgment rather than comply. On January 23, 1963 the Court of Appeals dismissed an appeal from the discovery order as interlocutory. In *International Business Machines Corp. v. United States,* 480 F. 2d 293, 298 (2d Cir. 1973) (in banc), IBM was not allowed to appeal, under the doctrine of Cohen, an order requiring disclosure of documents which it claimed were protected by the attorney-client privilege, an irremediable ruling once disclosure is made.

the Sherman antitrust law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." 51 Cong. Rec. 15986 (1914). The hundreds and thousands have become hundreds of thousands, and indeed, millions.[9] Without Rule 23, if their individual damages are too small to sustain the expense and burden of protracted litigation, they have no effective access to the courts for redress of their wrongs. In contrast, victims of antitrust violations who have the resources to sue individually or have enough at stake to make it worth while for counsel to take their cases do have effective access. See, *e.g., Philadelphia Electric Co. v. Westinghouse Electric Corp.,* 1964 CCH Trade Cases, ¶ 71,123 (E. D. Pa. 1964). The 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure assured that class action remedies would be effective in cases of mass injuries to small claimants arising out of violations of law falling within the jurisdiction of the federal district courts.

In the case of antitrust and securities law violations availability of the Rule 23 class action is especially appropriate, fortifying the high public purpose inherent in private enforcement of those laws. Treble damage plaintiffs act as private attorneys general in the scheme of antitrust enforcement. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 131 (1969); *Perma Life Mufflers v. International Parts Corp.,* 392 U. S. 134, 138-9 (1968). Private plaintiffs in federal securities law cases fulfill the same

9. ". . . [T]he occasions generating the class suits . . . [have become] mass production events . . . . So with the securities cases. They also involve mass production wrongs, rather than single instances like their original prototype." Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F. R. D. 307, 308. The Penn Central, Equity Funding and National Student Marketing Cases are three recent examples of such mass production wrongs.

function. *J. I. Case Co. v. Borak,* 377 U. S. 426, 432 (1964); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 382 (1970). Rule 23 is ideally suited to enhance those ends, as this Court recognized in *State of Hawaii v. Standard Oil Co. of California,* 405 U. S. 251 (1972). Hawaii had argued that:

> ". . . the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and [that] . . . denying Hawaii the right to sue for injury to her quasi-sovereign interests . . . [would therefore] allow antitrust violations to go virtually unremedied . . ."

This Court responded:

> "Private citizens are not as powerless, however, as the State suggests.
>
> "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. §1337; 15 U. S. C. §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 265-6.

Under the decision of the Court of Appeals, the victims of the odd lot dealers' antitrust violations and the Exchange's violation of the Exchange Act have been rendered completely powerless. Indeed, the first time that it dealt with this case, the Court of Appeals recognized that: "Dismissal of the class action . . . will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will, for all practical purposes terminate the litigation." (A106-7). In its second opinion, reversing the

District Court's dismissal of the class action, the Court of Appeals adhered to the view that "the only feasible way to litigate these claims is by a class action." (A125-6). At the same time the Court then recognized that: "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (A112).[10] The third opinion of the Court of Appeals has swept that all aside. The courthouse doors are barred to the class, despite the District Court's finding that they have a high probability of success on the merits. If the decision of the Court of Appeals is allowed to stand, Respondents will have accomplished a result which this Court has previously refused to countenance whereby ". . . those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." *Hanover Shoe Co. v. United Shoe Machinery*, 392 U. S. 481, 494 (1968).[11]

The ramifications of dismissal of this class action were forcefully stated by Judge Oakes, dissenting from denial of rehearing in banc in the Court of Appeals, as follows:

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10. The Court held that "the new rule should be given a liberal rather than a restrictive interpretation . . ." (A119). Other Circuits are in full accord: *Esplin v. Hirshi*, 402 F. 2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U. S. 928 (1969); *Arkansas Education Association v. Board of Education*, 446 F. 2d 763, 768 (8th Cir., 1971); *Schneider v. Electric Auto-Lite Company*, 456 F. 2d 366, 370 (6th Cir. 1972); *Kahan v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir.) *cert. denied*, 398 U. S. 950 (1970).

11. *Hanover Shoe* followed the holding in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 265 (1946), which reaffirmed that, "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."

> "The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts. The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance." (A379)

The *Eisen* decision can only ". . . encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat the class action." *Grad v. Memorex Corp.*, 17 F. R. Serv. 2d 934 (N. D. Calif. 1973). The class action is rooted in equity. *Hansberry v. Lee*, 311 U. S. 32, 41 (1940); *Smith v. Swormstedt*, 57 U. S. 288 (1853). Equity would be ill served by defeat of the Eisen class.

III. The Court of Appeals Erred in Dismissing the Class Action on the Ground That Petitioner Could Not Pay for Individual Notice to More Than Two Million Class Members.

(a) Individual Notice Is Not Required by Due Process.

In its 1968 opinion dealing with the merits of the class action issue, the Court of Appeals held that: "Under cer-

tain circumstances published notice may amount to the 'best notice practicable,' particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 . . . (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant." (A132). In its 1973 opinion, the Court granted that: "Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, . . ." again citing *Mullane*, but held that: "Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." (A368-9).

To the extent that the Court implies that individual notice to every identifiable class member in the circumstances of this case is a requirement of due process, it is in error. In *Hansberry v. Lee, supra,* this Court held that the adequacy of representation in a class action is the hallmark of due process. As Judge Oakes stated in his dissent:

> "All that the due process clause requires is a procedure that 'fairly insures the protection of the interests of absent parties who are to be bound by [the judgment].' Hansberry v. Lee, 311 U. S. 32, 42 . . . (1940) (not cited by panel decision). See Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 313-14 . . . (1950); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1960). See also C. Wright, supra at 313; Kaplan, supra, 81 Harv. L. Rev. at 391-92. But cf. Eisen II, 391 F. 2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a

prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U. S. C. A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. Mullane v. Central Hanover Bank and Trust Co., supra, 339 U. S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation—the Wall Street Journal, Business Week, Barron's, the New York Times financial section, and the like—would reach most of the class." [12]

Judge Oakes' analysis is particularly appropriate in the circumstances of this case. The statute of limitations has run on damage claims by class members.[13] No one but Eisen has brought suit. The Court of Appeals in its 1968

12. "To a substantial degree, Judge Tyler's attitude toward the policy behind the notice requirement of Rule 23(c)(2) and his specific plan for providing notice reflect the prevailing consensus of the commentators." *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 Mich. L. Rev. 338, 355 (1971). See also Miller, *Problems of Giving Notice In Class Actions,* 58 F. R. D. 313. Professor Benjamin Kaplan (now a Justice of the Supreme Judicial Court of Massachusetts), Reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966 has pointed out that it will not be practicable to give notice under (c)(2) which will reach each member of the class in all cases "but when large numbers of people are dealt with, perfect notice, while on the one hand hard to obtain becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if in fact such differences exist) will in fact be reached and will speak up." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 396.

13. Defendants pleaded the statute of limitations as a defense in their answers to the complaint.

opinion was satisfied that: ". . . the present case appears to fall within that class of cases in which 'the interests of individuals in conducting separate lawsuits' are more 'theoretic than practical' . . ." a belief ". . . reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit." (A126).

In such circumstances, a prime purpose of the notice requirement of Rule 23(c)(2), to provide an opportunity for class members to opt out of the class, is of little significance. "From a functional point of view, the need for notice and for the privilege to opt-out seems minimal in cases where individual prosecution is economically infeasible and, as a consequence, the class member's interest in controlling the prosecution or defense of a separate action is only theoretical. As a practical matter, the individual member in such cases will rarely have a rational basis for opting out." Homburger, *State Class Actions and The Federal Rule,* 71 Colum. L. Rev. 609, 637 (1971). As Judge Mansfield noted in *Berland v. Mack,* 48 F. R. D. 121, 129 n. 3 (S. D. N. Y. 1969), class members in (b)(3) actions rarely opt out, particularly where the individual's stake is small.

In *Mullane v. Central Hanover Bank and Trust Co.,* 339 U. S. 306 (1950), individual notice was important, because there were potentially adverse interests between the bank, filing its trust account, and the beneficiaries, and between different classes of beneficiaries. Eisen and the class members he seeks to represent have no such conflict. Their interests are identical in establishing Respondents' liability. Divergence, if any, would not arise prior to determination of liability and creation of a fund for the benefit of the class. At that time, the question of what further notice might be required or desirable, might be quite different. A broader notice might then be in order. Likewise, *Schroeder v. City of New York,* 371 U. S. 208 (1962) is

plainly distinguishable, since no one shared and represented the plaintiff's interest against the City's taking of her property. In contrast, Eisen, who is an adequate representative of the class, is seeking to obtain a recovery in the interest of the class.

As another panel of the Second Circuit stated, approving notice by publication in a class action:

> "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. . . . The Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 . . . (1949) noted: 'This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.'" *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090 (2d Cir.), *cert. denied sub nomine Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U. S. 871 (1971).

In the circumstances of this case at this stage individual notice is not required by due process.

(b) Individual Notice Is Not Required by Rule 23(c)(2).

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." What is "practicable" and what constitutes "reasonable effort" are issues best left to the discretion of the District Court. It was stipulated in the District Court that the names and addresses of approximately 2,000,000 class members could be generated by comparing the records and tapes

of the odd-lot firms with the tapes of fourteen of the largest brokerage firms. Respondents agreed that: "such names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders." (A185). Respondents' willingness to undertake the obviously extraordinary effort of generating 2,000,000 names does not make the effort reasonable within the meaning of Rule 23(c)(2). Respondents gladly volunteered to perform an enormous task, because they hoped to abort the class action by imposing the prohibitive cost of individual notice on Petitioner. The Court of Appeals held that: "If identification of any number of members of the class can readily be made, individual notice must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action." Beguiled by Respondents' offer to generate the names, the Court of Appeals lost sight of the effort involved. It held, in effect, that whenever a defendant is willing to furnish names and addresses, regardless of the effort, plaintiff is saddled with the cost of individual notice, regardless of how prohibitive. Defendants in mass securities frauds or antitrust violations are thereby given the power to prevent any effective relief for their victims.

The language of the Rule requires no such rigid or impracticable result.[14] The notice ordered by the District Court was well within the bounds of its discretion. The court fairly devised the "best notice practicable under the

14. Even if the Rule could be read as the Court of Appeals has read it, ignoring the "effort" involved, Professor Miller has persuasively argued that it should not be given that interpretation. Miller, *op. cit., supra*, 58 F. R. D. at 320.

circumstances", combining notice by publication with selective individual notice designed to reach representative members of the entire class, as well as those members with the greatest stake.

(c) The Court of Appeals Failed to Consider Reasonable Alternatives for the Purpose of Satisfying Notice Requirements and Erred in Holding That Notice Is Required in 23(b)(1) or (2) Class Actions.

Judge Oakes' dissent expresses the view that individual notice to 2,000,000 class members is not required, and the Court's resolution of the issue "seems . . . inconsistent with the spirit of Rule 23, . . ." but that in any event, the class action should not have been dismissed without consideration of reasonable alternatives (A382).

> "The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. See Kaplan, *supra,* 81 Harv. L. Rev. at 390-91; Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 438-54 (1960). . . .

Rule 23(c)(4) provides that: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

Another alternative would be to establish a class on the issue of liability, under Rule 23(b)(1) or (2), then, if Respondents are found liable, to proceed to determine damages under the aegis of a 23(b)(3) class. Rules 23(b)(1) and (2) permit a class action to be maintained where the requirements of 23(a) are satisfied,[15] and

> "(1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . ."

The Eisen class action fits into either 23(b)(1) or (2).[16] "[T]he requirements of Rule 23(b)(3) need not be met if the requirements of one of the other subsections of Rule 23 are met." *Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F. 2d 540, 543

15. The District Court found that the requirements of 23(a) were satisfied. The Court of Appeals did not reverse on that issue.

16. The complaint requests injunctive relief. Regarding the appropriateness of injunctive relief see pp. 50-52, *infra*.

(3d Cir. 1973). Rule 23 contains no requirement that notice must be given of a class action determination under (b)(1) or (2). In its 1968 opinion, the Court of Appeals erroneously held that (b)(1) and (b)(2) were not applicable, but in any event, notice was a requirement of due process in all class actions, including (b)(1) and (b)(2) actions, misreading *Hansberry v. Lee* and *Mullane v. Central Hanover Trust Co., supra.* In *Hammond v. Powell,* 462 F. 2d 1053, 1055 (4th Cir. 1972), the Fourth Circuit reached the opposite conclusion: "Furthermore, since this class action plainly comes within the ambit of F. R. Civ. P. Rule 23(b)(2), the notice requirement of Rule 23(c)(2) does not apply." The First Circuit agrees with the Fourth. *Yaffe v. Powers,* 454 F. 2d 1362, 1366 (1st Cir. 1972). *Cf. Amalgamated Workers Union of the Virgin Islands v. Hess Oil Virgin Islands Corp., supra.*[17]

Petitioner submits that the holding of the First and Fourth Circuits and the views of Professor Miller are correct; that the action may be maintained on the issue of liability under 23(b)(1) or (b)(2), and that the notice directed by the District Court more than satisfies the requirements

17. Professor Miller's view is that the *Eisen* decision is wrong on this issue; "that it fails to give sufficient weight to the mass quality of the class action; that the analogy occasionally drawn to the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Company* is not persuasive; and that most of the Supreme Court prounouncements concerning notice are distinguishable because they involve single plaintiff—single defendant litigation.

"Support for the position that notice to absent class members is not mandatory, is provided by the availability of other procedural safeguards. Before a class action can proceed, Rule 23(a) requires the Court to determine that the class is adequately represented. This prerequisite effectively satisfies the due process concerns that usually are reflected in a notice requirement. If the class representatives are found to have the qualities necessary to protect the interests of the other class members then those represented, in effect, have had a day in court under conditions that meet due process standards and notice is not constitutionally required." Miller, *op. cit., supra,* 58 F. R. D. at 314-5.

of due process. If liability is determined in favor of the class, it then would be entirely appropriate to proceed with a (b)(3) class action to determine on what formula damages should be computed and how such damages should be distributed. At that stage it would be feasible to consider massive individual notice, since Respondents would be liable for the costs. *Cf. Mills v. Electric Auto-Lite Co., supra; Partain v. First National Bank of Montgomery,* 59 F. R. D. 56, 62 (M. D. Ala. 1973).

IV. The Court of Appeals Erred in Holding That the District Court Was Without Authority to Allocate the Cost of Notice Between the Parties, on the Basis of a Preliminary Evidentiary Hearing on the Plaintiff's Probable Success on the Merits.

The plaintiff's financial ability to furnish notice to the class is not included in Rule 23 as a prerequisite to maintenance of a class action, or even as a factor to be considered in deciding whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(c)(2), the only part of the Rule which requires the giving of notice, and which presupposes that an action has already been determined to be properly maintainable as a class action under 23(a) and (b), provides that the court shall direct notice to the class. It does not provide that the court shall direct the plaintiff to furnish the notice.

Numerous district court decisions have taken this to mean that it is proper to allocate the cost of notice between the parties. *Dolgow v. Anderson,* 43 F. R. D. 472 (E. D. N. Y. 1968); *State of Minnesota v. U. S. Steel Corp.,* 44 F. R. D. 559, 577 (D. Minn. 1968); *Bragalini v. Biblowitz,* 1969-1970 Fed. Sec. L. Rep. ¶92,537 (S. D. N. Y. 1969); *Berland v. Mack,* 48 F. R. D. 121 (S. D. N. Y. 1969); *Feder*

v. Harrington, 52 F. R. D. 178, 184 (S. D. N. Y. 1970); *Miller v. Alexander Grant & Co.*, 1971-72 Fed. Sec. L. Rep. ¶ 93,287 (E. D. N. Y. 1971); *Mack v. General Electric Co.*, Civil Action No. 69-2653 (E. D. Pa., Order of September 7, 1971); *Lamb v. United Security Life Company*, 1971-1972 Fed. Sec. L. Rep. ¶ 93,489 (S. D. Iowa 1972).

In *Berland v. Mack, supra*, Judge Mansfield (now on the Court of Appeals for the Second Circuit) stated:

> "[W]e do not believe that *Eisen* established a hard and fast rule to the effect that the plaintiff must initially lay out the cost of notice. We have repeatedly been advised that flexibility is important to the proper application of Rule 23, Green v. Wolf Corporation, 406 F. 2d 291, 299 (2d Cir. 1968), and that considerable freedom must be allowed the trial judge who is saddled with the burdensome task of managing the class action. The decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion, having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." 48 F. R. D. at 131.

The decision of the Second Circuit has now established the inflexible rule that allocation is not permissible and that a hearing to determine the propriety of allocation is not authorized by Rule 23.

Neither Respondents nor the panel questioned the right of the District Court to hold an evidentiary hearing to establish the ability to identify individual class members. Indeed, in its 1968 decision, the Court of Appeals directed the District Court to hold an "evidentiary hearing, with or

without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." (A133). Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances . . . ." It is anomalous to hold that a hearing is proper on one aspect, i.e., what is the best notice practicable, but not on another interrelated aspect, i.e., on whom the burden of the court's direction should fall.[18]

Respondents were given a hearing on the cost of notice, with full opportunity to present evidence. No question of due process to Respondents is involved merely because, should they ultimately prevail, they may not succeed in recovering their costs. *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960). Due process requires only the right to be heard. *Fuentes v. Shevin*, 407 U. S. 67 (1972). At such a hearing, plaintiff need only establish the probable validity of his claim. *Id.* at 97; *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 343 (1969) (Mr. Justice Harlan, concurring). Moreover, due process ". . . tolerates variances in the *form* of a hearing, 'appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 313 . . . ." *Fuentes v. Shevin, supra*, 407 U. S. at 82.

Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial

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18. The Court of Appeals relied on the ruling by the Fifth Circuit in *Miller v. Mackey International, Inc.*, 452 F. 2d 424, 427-28 (5th Cir. 1971), for its conclusion that "the preliminary hearing on the merits was improper." On September 4, 1973, the Fifth Circuit, in banc, held that *Miller* did not foreclose preliminary hearings in class actions. *Huff v. N. D. Cass Company of Alabama*, 17 F. R. Serv. 2d 934 (5th Cir. 1973).

expenditures to comply with discovery orders,[19] or for the cost of defense,[20] or from attachments or preliminary injunctions, where the security posted may not be sufficient to cover the loss.[21]

V. The Court of Appeals Erred in Dismissing the Class as Unmanageable and Rejecting Out of Hand Any Possibility of Fluid Recovery.

(a) The Class Action Is Manageable.

The District Court found that the class action was manageable, analyzing the record in prior comparable cases, including the *Pfizer* case, *supra* (A205-6).[22]

The Court of Appeals in its prior opinion took particular note that: "Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about $17,000,000. Over 85% of the claims were for less than $25 and refunds were made to more than a million people. See Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U. S. 648 (1939)."

By comparison, the cost of the initial notice found by the District Court in this case to satisfy due process and Rule 23(c)(2) was approximately $21,720. If liability and

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19. See, *e.g., Hughes Tool Co. v. Trans World Airlines, Inc., supra.*

20. *See, e.g., Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649 (3d Cir. 1967) (Successful antitrust defendant may not recover his counsel fees from plaintiff).

21. See, *e.g., West v. Zurhorst, supra.*

22. As an example of a recent instance in which mass relief has been effectively administered, 6,682,084 Chevrolets were recalled on December 10, 1971, for a minor repair pursuant to 15 U. S. C. § 1402. U. S. Dept. of Transportation, *Motor Vehicle Safety Defect Recall Campaigns, from January 1, 1971 to December 31, 1971.* Over 2,000,000 automobile owners responded. Detroit News, November 1, 1972.

damage should be determined in favor of the class, the cost of more extensive notice to invite filing of claims under Rule 23(d), including the cost of mailing individual notices to the more than 2,000,000 identifiable class members, plus nationwide and foreign publication, and processing of claims, would be approximately $500,000, as against gross potential trebled damages to the 6,000,000 members of the class, estimated at a minimum of $22,000,000 and a maximum of $60,000,000.[23]

Without any basis in the record, and contrary to the findings of the District Court,[24] the Court of Appeals has now surmised that ". . . the costs of administration might run into the millions of dollars." (A354). Furthermore, the Court concluded that "notices by publication giving the essential information required by amended Rule 23 are a farce" and "it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing." (A369). Therefore, since the Court categorically rejected any pros-

23. The $60,000,000 estimate is fully corroborated by a document introduced by the defendants at the hearing on allocation of the cost of notice, the June 14, 1966 Report on Odd-Lot Operations and the Differential by the Special Committee to the Board of Governors of the Exchange (Defendants' Exhibit F). This maximum estimate is conservative. As noted in Defendants' Brief in the Court of Appeals (p. 13) a July 7, 1972 change in odd-lot floor procedures, which appears to implement cost-saving recommendations of Ebasco, a firm engaged in 1956 to study and make proposals for modernization of Exchange methods, has reduced the odd-lot differential even more drastically, resulting in a further saving estimated at $5 million annually. The District Court found that the Ebasco proposals were "unconsidered and unimplemented" throughout the period in litigation, although suggested to the Exchange in 1957 (A283-4). Accordingly maximum damages may be as much as $120 million.

24. The District Court's findings were vacated because the Court of Appeals held that it lacked authority to hold a preliminary hearing, not as "clearly erroneous".

pect of fluid recovery, the action was unmanageable and must be dismissed as a class action. In contrast, the First Circuit has stated: ". . . for a court to refuse to certify a class . . . because of vaguely-perceived management problems is counter to the policy which originally led to the rule, and more especially to its thoughtful revision, and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise. *See* Committee's Criticism and Notes to Revised Rule 23, 3B Moore's Federal Practice ¶ 23.01 [8]-[13] (2d ed. 1969)." *Yaffe v. Powers, supra,* 454 F. 2d at 1365.

The Court of Appeals ignored the liability of Respondents to pay costs, if they are found liable. *Mills v. Electric Auto-Lite Co., supra; Partain v. First National Bank of Montgomery, supra; Bright v. Philadelphia-Baltimore-Washington Stock Exchange,* 327 F. Supp. 495, 506 (E. D. Pa. 1971). Thus, at the stage of the case where notice would be given to individual class members of their right to file proofs of claim for damages, the initial notice could be expanded upon, as the District Court contemplated would be done, at no expense to the class (A225, n. 12). Since fifty-six percent of the transactions of the class are preserved on computer records (A184-5), there is a fair likelihood that individual recoveries aggregating a substantial sum would be made, and effectively and economically administered, as in the Illinois Bell Telephone rate case and many others.

(b) Fluid Class Recovery Stands on Firm Legal Ground.

Just as the Court of Appeals characterized notice by publication as a farce, it dismissed the fluid recovery as a "fantastic procedure", which must be rejected "as an

unconstitutional violation of the requirement of due process of law." The Court has substituted rhetoric for reasoned analysis.[25] It ignores the fundamental character of the class action as a creature of equity. *Hansberry v. Lee, supra; Smith v. Swormstedt, supra; Montgomery Ward & Co., Inc. v. Langer,* 168 F. 2d 182, 187 (8th Cir. 1948). Equity has power to direct wrongdoers to disgorge the proceeds of their violations. *SEC v. Manor Nursing Centers, Inc.,* 458 F. 2d 1082, 1104 (2d Cir. 1972).

Professor Miller has written in favor of employing in the class action context "the same type of flexibility toward administering relief . . ." as traditionally exercised by courts of equity. "Accordingly, a federal court should feel free to experiment in awarding relief under Rule 23. It has the tools to shape the remedy to meet the exigencies of each case and difficulties in administration should not be allowed to destroy the usefulness of the class action procedure." Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3),* 54 F. R. D. 501, 511-12. This accords with the observation of the Chief Justice that: "Procedure should be tailored to need, not to some abstract standard." Report on the Federal Judicial Branch—1973, by Chief Justice Warren E. Burger, 59 A. B. A. Journal 1125, 1128

25. The Court unfortunately repeats the inflammatory phrase of Professor Handler that class actions are "legalized blackmail" and even dredges up a reference to "the old fashioned strike suits made famous a generation or two ago by Clarence H. Venner." Professor Handler is partisan. He is a senior member of a law firm actively representing in his private practice numerous antitrust defendants. For example, he used the "blackmail" argument as an advocate representing Texaco a defendant in a price-fixing class action, recently settled for $29,000,000. *City of Philadelphia v. American Oil Co.,* Civil Action No. 647-68 (D. N. J.). The blackmail spectre was raised, unsuccessfully in opposition to passage of the Clayton Act itself. 51 Cong. Rec. 16275 (1914). Private enforcement of the Antitrust and securities laws is intended to have a deterrent effect, and this Court has held that it is properly enhanced by class actions under Rule 23. See, *supra,* pp. 26-27.

(October 1973). ". . . [P]rocedural techniques . . . are the children of equity . . ." *Quinault Allottee Association & Individual Allottees v. United States,* 453 F. 2d 1272, 1274, n. 1 (Ct. Cl. 1972).

The Second Circuit itself had already approved the fluid class principle as an appropriate method of dealing with a class of millions of antitrust violation victims with small individual claims, in *State of West Virginia v. Chas. Pfizer & Co., supra.* One of the major issues on appeal in *Pfizer* concerned ". . . the propriety of permitting the states to recover through their attorneys general damages on behalf of individual consumers who have not themselves filed any claims." 440 F. 2d at 1089. The Court expressly approved that aspect of the settlement as follows:

> "We conclude, however, that the use of what might be termed the 'Book-of-the-Month-Club' procedure in these circumstances should be permitted. The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing the state through its Attorney General to recover on their behalf. Presumably there were among this group some who read the notice and made an affirmative decision to assign their claims. Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a (b)(3) class who do not elect to opt out will be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum." 440 F. 2d at 1091.

If Petitioner succeeds in establishing liability here, a prospect which the District Court has judged to be excellent, there is no reason why a notice program similar to that sustained in *Pfizer* with a comparable "assignment" technique, could not be utilized, informing the class that, to the extent that gross damages determined to have been sustained by the class as a whole were not claimed by individual class members, they would be deemed to have been assigned for the benefit of future odd lot customers. Equity would be well served by such a procedure, as would the public policy of the antitrust and securities laws.

Conceptual difficulties concerning the right to recover damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, can be dealt with as they were in *Pfizer*. While Section 4 speaks of recovery by persons injured in their business or property, it does not spell out what such persons must do with their recovery once liability is established, nor does it prevent them from assigning or otherwise disposing of their interests. A finding of liability would establish that every member of the class was injured during the period in suit by being compelled to pay the odd-lot differential fixed in violation of the antitrust laws. Adoption of the *Pfizer* technique would have the virtue of assuring that Respondents do not keep their ill-gotten gains, an objective with which this Court expressed its full accord in *Hanover Shoe Co. v. United Shoe Machinery Corp., supra,* 392 U. S. at 494. See also *SEC v. Golconda Mining Co.,* 327 F. Supp. 257 (S. D. N. Y. 1971).

In *Eisen* the overcharge was paid directly by the plaintiff class. That class alone is in a position to make sure that the defendants do not "retain the fruits of their illegality."[26] Each and every member of the *Eisen* class is a

26. Even where there are competing classes, the Courts are able to fashion relief to the end that "there be no hiatus in the enforcement" of the antitrust law. . . . Where the choice is between a windfall to intermediaries or letting guilty defendants go free liability

person injured in his business or property, within the literal wording of Section 4 of the Clayton Act, 15 U. S. C. § 15, and each and every one is directly injured, so that in computing damages for the class as a whole, and applying the *Pfizer* technique for distribution, the court would be carrying out the statutory intent that those injured are entitled to recover. *Cf. In Re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 287-9 (S. D. N. Y. 1971), *mandamus denied,* 449 F. 2d 119 (2d Cir. 1971).

The concept of a fluid class recovery has received wide approval from the courts in analogous situations. In *Bebchick v. Public Utilities Commission,* 318 F. 2d 187 (D. C. Cir., in banc), *cert. denied,* 373 U. S. 913 (1963), millions of bus riders in Washington, D. C., had been overcharged a nickel on their fare over an eleven month period. Defendants argued that the case should be dismissed because there was no feasible way to return such small sums to so many people, who could not be readily identified. The Court of Appeals refused to let the wrong-doer keep the illegal overcharge, holding:

> "It is not feasible to require refunds to be made to individuals who paid the increase. Nevertheless, the amount realized by Transit from the increase must be utilized for the benefit of the class who paid it, that is, those who use Transit. To accomplish this Transit will be required to establish a fund in an amount equal to the 5 cent increase collected during the specified period, in other words, $\frac{5}{25}$ or 20 per cent of the total cash fares collected." 318 F. 2d at 203-04.

The court thus required the company to pay for the benefit of future riders damages sustained by past riders, even

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26. (Cont'd.)
is imposed." *In Re Western Liquid Asphalt Cases,* 1973 CCH Trade Cases, ¶ 74,733 (9th Cir. 1973), at p. 95,220-21. "To permit so large a fish to escape the nets is unthinkable." Id. at p. 95,219.

though the two classes would not be identical since some riders would cease to use transit, and new riders would replace them. The same kind of remedy was contemplated by Petitioner's suggestion here ". . . that a fund equivalent to the amount of the unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted."

The courts reached the same result in *Market Street Railway Co. v. Railroad Commission,* 28 Cal. 2d 363, 171 P. 2d 875 (1946) (where the overcharge was one penny a ride); *Olson v. The County of Sacramento,* 79 Cal. Rep. 140, 145 (Cal. Ct. App., 3d Dist. 1969); *Alaska Steamship Co. v. Federal Maritime Commission,* 344 F. 2d 810, 815 n. 4 (9th Cir. 1965); and *Daar v. Yellow Cab Co.,* 67 Cal. 2d 695, 433 P. 2d 732 (1967).

In *Metro Homes, Inc. v. City of Warren,* 19 Mich. App. 664 (1969), *leave to appeal denied,* 383 Mich. 761, *cert. denied,* 398 U. S. 959 (1970), a class action, it was held that the class was entitled to restitution of money collected under an unconstitutional ordinance. The trial court ordered the full amount collected be paid into Court. On appeal, the defendants urged that the judgment be modified to require payment into Court of only those funds for which an individual claim was filed within three to six months after notice was given. Their argument was rejected, as follows:

> "We believe that the present judgment best serves the interests involved here. Regardless of the mechanics of distribution, the judgment in this class action conclusively determines the city's liability to each member of the class. See *International Typographical Union v. County of Macomb* (1943), 306 Mich. 562. Consequently, no apparent purpose is served by making the filing of a claim a condition of recovery. The difficulty

with the defendants' proposed modification is that the city should not be permitted to retain any part of the unconstitutionally gained funds." 19 Mich. App. at 674-5.

Shareholder derivative suits frequently reach the "fluid class" result by indirection, since to the extent that shares are transferred during the litigation the shareholders who reap the benefit may not be the same ones who incurred the loss. As an extreme example, in *Perlman v. Feldman,* 129 F. Supp. 162 (D. Conn. 1952), *rev'd,* 219 F. 2d 173 (2 Cir. 1955), *on remand,* 160 F. Supp. 310 (D. Conn. 1958), the ultimate recovery went to a new owner who had purchased more than 95% of the shares subsequent to the wrongs complained of. See Moody's Industrial Manual (1955), p. 2646.

(c) Fluid Class Recovery Is a Legally Sound Remedy for Violation of the Exchange Act.

Liability of the Exchange is predicated on federal common law, and recovery thereunder is not limited to persons defined by statute. "It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none." *Baird v. Franklin,* 141 F. 2d 238, 245 (2d Cir.), *cert. denied,* 323 U. S. 737 (1944). "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' . . ." *J. I. Case Co. v. Borak,* 377 U. S. 426, 433 (1964). *Accord, Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U. S. 388, 397 (1971).

This plenary power to fashion federal remedies for violations of the Exchange Act is not limited by any statutory equivalent of Section 4 of the Clayton Act. The full panoply of relief is available, unrestricted by technical concepts of injury to business or property. Requiring the Exchange to pay damages on a "fluid recovery" basis, such as that approved by the Second Circuit in *Pfizer,* would be in accord with the principles of equity, and within the scope of remedies to be fashioned under *J. I. Case v. Borak, supra.*[27]

The Court of Appeals simply did not come to grips with this argument. Briefly restating it, the Court dismissed it without analysis by saying: "We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo",* a curious reading of such cases as *J. I. Case v. Borak, supra.*

The equitable powers of the court to fashion an effective remedy under the Exchange Act for the Exchange's breach of its fiduciary duties to investors are fortified by the origin of the class suit as ". . . an invention of equity . . ." *Hansberry v. Lee, supra; Smith v. Swormstedt, supra; Montgomery Ward & Co., Inc. v. Langer, supra,* 168 F. 2d at 182.

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27. While the Exchange did not itself receive the illegally exacted odd-lot differential, its breach of its statutory fiduciary duty was instrumental in making its exaction possible. In *Dickinson v. Burnham,* 197 F. 2d 973 (2d Cir.), *cert. denied,* 344 U. S. 875 (1952), the Court held both wrongdoers jointly and severally liable for the consequences of their acts although each had retained only one half of the funds. Similarly, in *S. E. C. v. Texas Gulf Sulphur Co.,* 446 F. 2d 1301 (2d Cir.), the Court held a defendant liable for restitution of profits by his tippees.

Under established principles of equity the District Court was right in regarding as "crucial . . . the ability of the court to fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits." (A215-6).

(d) Fluid Recovery Is Appropriate Under Section 16 of the Clayton Act.

The complaint includes a prayer for injunctive relief. Such relief is authorized by Section 16 of the Clayton Act, 15 U. S. C. § 26, which provides for injunctive relief under the antitrust laws.

". . . [T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles,* 321 U. S. 321, 329-330, 88 L. Ed. 754, 760, 761, 64 S. Ct. 587 (1944). Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' *Id.* at 330, 88 L. Ed. at 761." *Zenith Radio Corp. v. Hazeltine Research, Inc. supra,* 395 U. S. at 131. See also, *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 351 F. Supp. 1153, 1209 (D. Hawaii 1972). Taking the profit out of monopoly by allowing a "fluid recovery" of the illegal overcharge is as appropriate as ordering divestiture to restore competition. "The relief in an antitrust case must be

'effective to redress the violations'' . . . *Ford Motor Co. v. United States,* 405 U. S. 562, 573 (1972).

Existence of the statutory treble damage remedy does not bar equity from affording comparable relief, including compelling restitution of illegal exactions. This Court so held under the analogous statutory scheme of the Emergency Price Control Act in *Porter v. Warner Holding Co.,* 328 U. S. 395 (1946). Speaking of the powers of equity, the Court stated: ". . . since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice . . . . It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the . . . Act may properly be entered by a District Court once its equity jurisdiction has been invoked under § 205(a)." 328 U. S. at 398-9. *Cf. Jordan v. Weaver,* 472 F. 2d 985 (7th Cir. 1973), *cert. granted sub nom. Edelman v. Jordan,* 37 L. Ed. 2d 396.

VI. The Court of Appeals Has Unjustifiably Limited the Discretion of the District Court.

Rule 23 entrusts the District Court with broad discretionary powers which the decision of the Court of Appeals has abrogated. The fundamental fallacy which permeates its whole opinion, is lucidly exposed by analyses of the Third and Tenth Circuits. In *Katz v. Carte Blanche Corporation,* — F. 2d —, 17 FR Serv. 2d 279 (3d Cir. 1973) (Petition For Rehearing In Banc granted, June 20, 1973),

the Court held that "great deference" should be given a District Court's class determination, stating the issues on appeal as follows:

> "(1) the standard to be applied . . . in reviewing the district court's pretrial grant of the class action; and
>
> (2) under that standard, whether the district court erred in granting the motion."

Under Rule 23 the district court retains discretion to modify its class action determination at any time before a final decision on the merits. The Third Circuit held that:

> "The district court's opportunity to review its own decision throughout the proceeding is part of the scheme in Rule 23 to vest broad discretion in the district court when dealing with class actions. Clearly, this broad discretion is essential if the court is to cope with the problems inherent in managing a class suit. Consequently, where the district court has granted a pretrial motion to proceed as a class, and where immediate appellate review of that order has been permitted, we conclude the appellant must make a convincing showing that the district court committed an abuse of discretion in granting the motion. Only, then will this court intercede."[28]

The Court of Appeals for the Tenth Circuit has manifested the same view, albeit in affirming disallowance of a

28. ". . . whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all the countervailing factors." *Greenfield v. Villager Industries, Inc.*, 483 F. 2d 824, 836 (3d Cir. 1973) (Opinion of Judge Adams, dissenting from denial of rehearing in banc).

Truth-in-Lending class action. *Wilcox v. Commerce Bank of Kansas City*, 474 F. 2d 336 (10th Cir. 1973). The Court regarded as the "seemingly most sensible alternative" that ". . . trial courts be permitted in the exercise of sound discretion to determine within broad and open-ended guidelines whether . . . [class action treatment] is superior to other available methods for the fair and efficient adjudication of the controversy on a case by case basis." 474 F. 2d at 348. Further, the Court stated: "We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical applications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case." Id. at 349.

Rule 23(c)(2) provides that: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . . ." What is "the best notice practicable" and what constitutes "reasonable effort" are plainly determinations which lie within the sound discretion of the District Court. Likewise, "fluid recovery" was not inflexibly adopted by the District Court, to the exclusion of individual claims. Indeed, 56 percent of the odd-lot transactions on the Exchange were recorded on computer tapes and could clearly form the basis for individual recoveries (A184-5).

The Court Appeals in *Eisen* erred in inflexibly holding that there is no area within which the District Court's discretion may operate.

CONCLUSION.

The May 1, 1973 decision of the Court of Appeals should be reversed, with directions to reinstate the District Court's orders of April 7, 1971 and April 4, 1972.

Respectfully submitted,

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APPENDIX TO PETITIONER'S BRIEF.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS.

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction

improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

15 U. S. C. § 78(f).

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, un-

less the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.
June 6, 1934, c. 404, § 6, 48 Stat. 885.

15 U. S. C. § 78aa.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and

decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.
June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

28 U. S. C. §§ 1291 and 1292(b).

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

§ 1292. Interlocutory decisions.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order:

Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-949, 72 Stat. 1770.

NOV 29 1973 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN,

Petitioner,

v.

CARLISLE & JACQUELIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS*

Movant NAACP Legal Defense and Educational Fund, Inc., respectfully moves the Court for permission to file the attached brief *amicus curiae,* for the following reasons. The reasons assigned also disclose the interest of the *amicus.*

(1) Counsel for the petitioner has consented to the filing of a brief *amicus curiae* by the movant. The present motion is necessitated because counsel for the respondents have refused consent.

(2) Movant NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on

account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(3) Over a long period of time, LDF attorneys have handled hundreds of class action cases in the federal courts whose object has been the securing of equal civil rights for Blacks and other minorities. Because of the readily available class action device, LDF has been able to benefit large numbers of persons to an extent that would have been otherwise impossible. We are concerned that a decision upholding the lower court's narrow and restricting interpretation of the class action rule might have a similarly limiting effect on the rule's applicability to civil rights litigation. Thus, *amicus* has a vital interest in this case beyond that of the immediate litigants and therefore presents in the attached brief additional considerations in support of petitioner's position.

WHEREFORE, movant prays that the attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

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Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN,

Petitioner,

v.

CARLISLE & JACQUELIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

ARGUMENT

I.

Introduction

As noted in the statement of interest, *amicus* has been engaged for many years in a comprehensive program of litigation in the federal courts to secure the constitutional and statutory rights of Blacks and other minorities. Over a period of years we have gained much practical experience in class action litigation under both the old and the revised version of Rule 23. Drawing on this experience, this brief will seek to demonstrate the indispensability of the class action as a device for furthering the national purpose of

achieving full equality, and the crippling effect on the class action that would result if restrictive notice and other requirements were imposed.

We are cognizant of the fact that, viewed narrowly, the present case only involves action brought under Rule 23(b)(3), while most litigation involving the enforcement of civil rights is brought under Rule 23(b)(2). However, in its 1968 opinion, the Court of Appeals rejected petitioner's position that the mandatory notice requirements involved in this case apply only to actions brought under 23(b)(3) and that therefore 23(b)(2) cases were subject only to the discretionary notice requirements of Rule 23(d)(2). The Court stated: "[W]e hold that notice is required *as a matter of due process in all* representative actions." 391 F.2d 555, at 564.

The third *Eisen* opinion makes it clear that the Court of Appeals based its ruling on a notion that strict adherence to notice requirements is required by the due process clause. Thus, its reasoning could be applied to all class action litigation regardless of which provision of Rule 23 is invoked. Moreover, the entire thrust of the lower court's decision is to remove from federal district judges discretion to deal with class actions in a flexible and innovative way. The Second Circuit has read the requirements of Rule 23 in the light of the due process clause as imposing rigid rules that will absolutely bar the maintenance of a class action unless they are adhered to.

Our concern is that such rules could have precisely the opposite effect as that contemplated by Rule 23; that is, the mandatory and discretionary notice requirements of Rule 23 are designed to protect the rights of members of the class on whose behalf such an action is brought. If they were applied in such a way as either effectively to eliminate the possibility of maintaining a class action or

to bind members of the class before the merits of an action are even explored, the result would only be to destroy or make unenforceable the rights of the very persons whom Rule 23 was designed to protect.

II.

The Role of the Class Action in Civil Rights Litigation

The Fifth Circuit has recognized that "racial discrimination is by definition class discrimination" (*Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). In order effectively to remedy such discrimination, therefore, an action must be maintainable on behalf of the entire class against whom the discrimination has been directed. Thereby the evidence adduced may relate not only to individual plaintiffs but also may go to prove the overall patterns of racial bias involved. Moreover, in such an action the court is able to grant relief that will deal not only with the immediate probems of the individual plaintiffs but that will correct practices that deny the rights of the entire class.

These principles were fully recognized in civil rights cases brought under the predecessor to the present Rule 23(b)(2). Thus, in *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963), the court based its holding that a school desegregation case *must* be maintainable as a class action on the ground that class-wide relief was necessary. See also, *Hall* v. *Werthan Bag Corporation*, 251 F.Supp. 184 (M.D. Tenn. 1966) (employment discrimination); *Lance* v. *Plummer*, 353 F.2d 585 (5th Cir. 1965) (public accommodations).

Lance provides a vivid illustration of the importance of being able to obtain class-wide relief. One of the earliest

cases brought under Title II of the Civil Rights Act of 1964, *Lance* was brought by eight named Black plaintiffs who sought relief on behalf of themselves and all other Black persons similarly situated. An injunction was issued by the district court on behalf of the class, prohibiting racial discrimination in public accommodations. Shortly thereafter, three Black persons who were not named plaintiffs were discriminated against in violation of the injunction, but were able to obtain immediate relief because they were members of the protected class. *Lance* is typical of many cases in that not only did its maintenance as a class action save the time and resources of individual members of the class, but also greatly diminished the burden on federal courts that would inevitably result if it were necessary for every aggrieved person to file his own lawsuit.

It is clear from the Advisory Committee's report to the revised Rule 23, that its drafters were fully aware of the development of the law in civil rights class action cases. Indeed, 23(b)(2) was intended, in substantial part, to codify those decisions which permitted such cases, and, indeed, to remove any doubts as to their maintainability. See, Advisory Committee's Report to Proposed Rule 23, 39 F.R.D. 73, 102, and cases there cited.

In light of the intent of the Advisory Committee, it may be presumed that there was no intention to require the imposition of rigid rules relating to notice and other matters that would have the effect of limiting the availability and effectiveness of civil rights class actions as they already existed under Rule 23. Indeed, early decisions liberally construed the new class action rule in such cases in a variety of contexts. See, *e.g., Jenkins* v. *United Gas Corporation,* 400 F.2d 28 (5th Cir. 1968) (granting of relief to named plaintiff does not moot claims of the class); *Huff* v. *N.D. Cass, Co.,* —— F.2d ——, 6 EPD

¶8800 (5th Cir., Sept. 4, 1973), and *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (named plaintiff may enforce claims of all Blacks discriminated against, and need not prove that his own claim has merit as a condition of doing so).

Further, and of great importance, the courts recognized the necessity of flexibility in administering class action cases in order to accomplish both goals of Rule 23; the protection of the rights of absent members of the class, while not at the same time cutting off any realistic possibility of their vindication. For example, in *Johnson, supra,* the Fifth Circuit, while noting that, contrary to *Eisen,* notice was *not* mandatory under Rule 23(b)(2), suggested that appropriate notice could be used by the district court if necessary. 417 F.2d at 1125.

Of course, the *Eisen* requirement that all potential and identifiable members of a class must be notified before an action may be maintained *at all* as a class action could have a devasting effect in many civil rights cases. For example, in at least one school desegregation case (*Baker* v. *Bd. of Public Instruction of Suwanee Cty., Florida,* (M.D. Fla., C.A. No. 73-796-Civ.-J-S)), a motion has been made to dismiss as a class action, citing *Eisen.* The typical school case is brought by a number of individuals as representative of all Black school children in a district. The number of persons in the class is substantially less than that involved in *Eisen;* their identity is as easily ascertainable through school district records. Just as in *Eisen,* however, the requirement that all members must be notified at the cost of the plaintiffs would effectively prohibit the bringing of a class action, particularly in school districts with tens or hundreds of thousands of students. The problem is even more acute since virtually all the private school desegregation litigation is conducted

by a single organization, the Legal Defense Fund, *amicus* in this case. The end result would be that school cases might only be able to be brought and relief obtained on behalf of the individual plaintiffs, leaving the federal courts in the anomalous position of leaving intact illegal and unconstitutional practices. Cf., *Potts* v. *Flax,* 313 F.2d 284, 289 (5th Cir. 1963); *Bradley* v. *School Bd. of Richmond,* 317 F.2d 429 (4th Cir. 1963).[1]

This is, of course, the crux of the *Eisen* rule, and why it must be rejected. *Eisen* purports to protect the rights of absent members of the class. In practical effect, it will have precisely the opposite effect; it will insulate those whose actions injure large numbers of persons from effective corrective action.[2] This result should not obtain in a case involving the rights of consumers or the class involved in *Eisen;* it would be all the more anomalous if a rule supposedly based on a purported constitutional right of class members to notice had the effect of rendering unenforceable their constitutional right to be free of class discrimination.

Indeed, the Constitution may require precisely the opposite result than that reached in *Eisen.* That is, if a restrictive notice requirement has the effect, as a practical matter, of cutting off substantial numbers of persons from the

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[1] *Amicus* does not mean to suggest, of course, that other members of the class, or other affected persons, could not participate in such a case if they desired. A school desegregation case is inevitably one of public interest; there is effective notice of its pendency. In many instances, interested groups or individuals make their views known through intervention or appearance as *amicus.* The point about *Eisen,* on the other hand, is that it mandates cripplingly expensive individual notice regardless of adequate alternative notice.

[2] It is significant that those who support the *Eisen* rule are not those involved in protecting the rights of consumers, etc., but are those against whom such class actions may be brought.

vindication of their constitutional rights because they lack the resources to pursue their claims individually, then it would violate due process. Thus, contrary to the view of the court below, Rule 23 should be read liberally in order to avoid this constitutional problem.

The potential effect of an affirmance of *Eisen* extends beyond the immediate question of whether personal notice must be given to class members at plaintiffs' expense. It has been the experience of *amicus* that lower federal courts have felt it necessary to impose a variety of other restrictive rules in class actions, and an approval of the *Eisen* court's attitude towards class actions could lead to an expansion of such devices.

The problems are most acute in actions brought under Title VII of the Civil Rights Act of 1964. Generally in such cases there are subclasses which are reasonably definable in term of the numbers of individual members. Thus, an action may be brought on behalf not only of all Blacks who may be discriminated against in the future by a company but also on behalf of the subclass of all present employees of the company. *Amicus* has no quarrel with requirements that seek to insure that the rights of absent members of a class are indeed protected. The problem is that, as in *Eisen,* requirements are being imposed that have precisely the opposite effect; that is, in the guise of protecting the rights of class members, they are used as means to cut off or limit those rights.

For example, in *Moody* v. *Albemarle Paper Company,* —— F.Supp. ——, 4 FEP Cases 561 (November 9, 1971), *reversed on other grounds,* 474 F.2d 134 (4th Cir. 1973), the district court approved the use of a "proof of claim" form to be sent by the defendants at the very beginning of the litigation. Class members were required to state in writing any back pay claim that they might have within a

specified period of time. During this period counsel for the plaintiffs representing the class was prohibited from communicating directly or indirectly with class members. Thus, for all practical purposes, members of the class were cut off from effective advice as to their rights under the action and as to the consequences of the failure to exercise those rights. A failure to file a proof of claim resulted in back pay claims being "forever barred" even before any determination on the merits as to whether there would in fact be any back pay award. In *Bing* v. *Roadway Express, Inc.*, —— F.2d ——, 6 E.P.D. ¶ 8878 (5th Cir., October 15, 1973), the court upheld the issuing of a notice which required employees to indicate in writing within thirty days their interest in a particular job. Subsequently, the district court refused to consider any individual relief for persons who failed to respond to this notice. Again, the problem with these types of strict notice requirements is that they require uncounseled members of the class to state whether or not they will make a claim long before they know whether any claim has any chance of being upheld.

To summarize, the decision of the Court of Appeals in this case takes a restrictive approach to Rule 23 that is not justified by the rule's language or purpose. The imposition of rigid notice requirements before a class action may be maintained will not protect the rights of the members of the class. To the contrary, if district courts are stripped of the power to respond to problems that may arise in class actions in a flexible manner, then the result will only be that the constitutional and statutory rights of large numbers of aggrieved persons will go unvindicated.

Conclusion

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973
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MORTON EISEN, and so forth,

Petitioners,

vs.

CARLISLE & JACQUELIN, *et al.*

Motion for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief of Amicus Curiae.

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Motion for Leave to File Brief Amicus Curiae in Support of Petitioners.

California Trial Lawyers Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for all three Respondents was requested but refused.

California Trial Lawyers Association is an association of approximately 5,000 lawyers who are members of the California Bar, and whose practice particularly relates to the courts at trial and appellate levels. The association conducts seminars and courses of study open to lawyers, and has conducted such seminars in class action matters. Many of its members have experience in class action litigation. It has a Class Action Committee, which works which the courts and members of the Bar in California relative to class action matters. Its interest in the case rises as a public service to the California court system, because of the importance of this case to future class action litigation in California and in other states.

In the instant case, the Court of Appeals declined to give weight to California cases and experience in class action litigation on grounds that the California class action statute is different from Rule 23, Federal Rules of Civil Procedure. In fact, California courts give great weight to Rule 23, and the California experience in class actions is believed to be highly relevant to the issues the United States Supreme Court will consider. Since many of the California cases on class action are recent, and California has taken measures simplifying trial court management of class actions, it is believed that the brief which *amicus curiae* is requesting permission to file will contain argument on the California experience which would be helpful to this Court and to the parties, and which otherwise might not be made. If this argument is accepted, it can dispose of many issues raised by the Court of Appeals below.

Respectfully submitted,

CALIFORNIA TRIAL LAWYERS ASSOCIATION,

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IN THE

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Amicus Curiae Brief in Support of Petitioners.

Contrary to Judge Medina, California Class Action Law Is Closely Interrelated to Rule 23, Federal Rules of Civil Procedure.

The ultimate decision in this case will have an important influence on consumer litigation, particularly consumer class actions, in state jurisdictions. This effect is multiplied by the fact that state courts are following the model of Federal Rule 23, and the decisions thereunder. *Amicus* believes that California in particular will suffer if the *Eisen* decision below is allowed to stand.[1]

Under the case of *Snyder v. Harris,* 394 U.S. 332, Reh. den'd 394 U.S. 1025 (1969), federal class actions based upon diversity are limited to classes in which the claim of each plaintiff class member is at least $10,000.00. Thus, most consumer class actions will

[1]*Eisen v. Carlisle & Jacquelin,* 479 F.2d 1005 (1973).

fall within state court jurisdiction. The California courts have entertained class litigation, including consumer litigation, under the authority of California Code of Civil Procedure 382, and other sections.[2] There are no state-wide rules of court paralleling Federal Rule 23.

Judge Medina's opinion, at 1012, incorrectly represents that *Daar v. Yellow Cab Company*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 443 P.2d 732 (1967) implies that all California class actions are outside the framework of Rule 23 precedent. Judge Tyler in the trial court below used *Daar v. Yellow Cab Company, supra,* as precedent for orders at trial level. Judge Medina in reversing Judge Tyler distinguished *Daar* as (1) being under a "state class action statute very different in the phraseology from amended Rule 23," and (2) being a "ruling made on demurrer."[3]

On Judge Medina's second *Daar* point, he is technically right but wrong in substance. *Daar* was decided on demurrer, but on demurrer to class action issues. The lower court did not dismiss the named plaintiff's causes of action; it sent it to the Municipal Court thus preserving individual causes as did Judge Medina in *Eisen,* below. It dismissed the class action. Technically, such dismissal of class issues was not appealable, but the Supreme Court of California granted the appeal and reversed, holding that the class dismissal was in effect a dismissal of the action.

On his first *Daar* point, Judge Medina's analysis is quite wrong. California Code of Civil Procedure Sec-

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[2]See, *e.g.*, 2 CAR 69 (Class Action Reports, Washington, D.C., Vol. 2, No. 3, 3rd Qtr. 1973) assigning a leadership role in class actions to California courts.

[3]479 F.2d 1005, at 1012.

tion 382 is indeed different in language from Federal Rule 23; but under California law and procedure Federal Rule 23 is used as persuasive precedent in California class action litigation. In the leading case of *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) at 821, the Court said: "In the event of a hiatus [in California law], Rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful" (Citing *Daar, supra*).

California Law Fits Trial Procedure Under Federal Rule 23 Better Than Judge Medina's Decision Below.

Federal Rule 23 gives wide latitude to the trial court, 23(c) and (d), in determining the maintainability of class action, and in making orders for the conduct of class actions. In *Eisen*, the Court of Appeals sees complexities and inpracticalities where the trial court itself has been simplifying the issues and performing the practical. It is Judge Medina, not the trial judge, who takes umbrage at the large number in plaintiffs' class. The trial court is willing to "maintain" the action under Rule 23(c); it is the Appellate Court which does not want to face the problems. Where the trial judge has made orders, under Federal Rule 23(d), determining the course of proceedings, making provision for fair notice, and dealing with similar procedural matters, exactly as anticipated by Federal Rule 23(d), Judge Medina on appeal has found the practical progress made by the trial court, including the use of "fluid recovery," to be impractical. It is Judge Medina who resists the idea of a court bothering with small individual recoveries (*cf.* "$1.30", at 49 F.2d at 101), while

the trial court is willing to focus on the contentions of both sides as to the whole issues involved, whether any one plaintiff's interest is large or small. Likewise, where Judge Medina rejects "mini-hearings" at the trial level, he gives plaintiff class "mini-hearing" treatment of dismissal at the appellate level. The work of the trial court below in processing this particular case, under Rule 23, has been grossly overlooked and undervalued by the Court of Appeals in its opinion below.

In *Daar, supra,* as in *Vasquez, supra,* the California Supreme Court expressly cites, approves, and follows Federal Rule of Civil Procedure 23.[4] The court in *Daar* did not dismiss the complaint when problems of common relief arose. Said the court (67 Cal.2d at 709):

> "As a practical matter, a requirement of common relief has no compelling importance and its absence presents no insuperable difficulties. . . . ,"

putting such issues over to a time "after the common issues have been resolved . . . ." Nor did the smallness of individual recovery bother the court, which said (*ibid.,* p. 715):

> ". . . absent a class suit, recovery by any of the individual taxicab users is unlikely . . . . separate actions would be economically unfeasible. . . . Joinder of plaintiffs would be virtually impossible. . . . absent a class suit, defendant will retain the benefits of its alleged wrongs."

Daar was sent back to the trial court, and eventually settled favorably to plaintiff class. The *Daar* case cites may other California cases showing class actions to be workable.

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[4]67 Cal.2d at 708, 709.

Following *Daar*, in *Collins v. Rocha*, 7 Cal.3d 232, 102 Cal.Rptr. 1, ... P.2d .... (1972), the California Supreme Court conceded that individual proof of damages for each class member in a relatively small class might become necessary, but nevertheless ruled that a class action was appropriate and that the trial court erred in sustaining a demurrer for lack of classness.

In *Anthony and Lockerbie v. General Motors Corporation*, 33 Cal.App.3d 699, ... Cal.Rptr. ...., ... P.2d .... (1973), a complex products liability case involved 200,000 G.M. trucks, the court trial granted a defense motion that the case not be maintained as a class action. The Court of Appeal reversed. Referring to Federal Rule 23 as a model (at p. 703), it sent the case back for trial. Defendant G.M. did not appeal to the California Supreme Court.

The definitive authority on class actions in California is *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971). Speaking for a unanimous court, Justice Mosk gave careful, practical, and scholarly current review of class action litigation. Justice Mosk did extensive analysis of cases and authorities. It is respectfully submitted that this decision is more in the conceptual, intellectual, and legal inheritance of Federal Rule 23 than is the opinion of Judge Medina in *Eisen*, below. Says Justice Mosk, at 807 (quoting 8 U. of Chi. L.Rev. 684, 686):

> "Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone, if and when he can,

there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much of the contemporary law . . . ."

Where Judge Medina takes trial court orders as "mini-hearings," and rejects them under Rule 23, Justice Mosk, in *Vasquez* (*supra*, at p. 820) states:

> "If the class action is to prove a useful tool to the litigants and the Court, pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties . . . ."

Judge Medina overlooks class action benefits to the courts, defendants, and the public. He states (479 F.2d at 1018):

> "Class actions have sprouted and multiplied like the leaves of the greenbay tree. . . .
> "So far as we are aware not a single one of these class actions . . . has ever been brought to trial and decided on the merits."

He conceives that only plaintiffs benefit from class actions.

A judgment in a class action, whether for or against the plaintiffs, is binding on all members of the plaintiff class.[5] Defendants have the benefit of *res judicata*. Even during the trial the defendant is protected from a multiplicity of suits by the on-going class action. In the case of *Bizer v. General Motors Corporation*, No.

[5]Moore's Federal Practice, 2d Edition, 1969, Vol. 3B, pp. 23-32.

C226435 pending in the Superior Court of the State of Arizona in and for the County of Maricopa, defendant General Motors Corporation obtained a stay of Arizona proceedings based upon a previously filed California class action, *Anthony and Lockerbie v. General Motors Corporation*, No. 959058 in the Superior Court of the State of California for the County of Los Angeles.

Judge Medina nowhere refers to the failure of justice when a class action is dismissed. The California court in *Vasquez v. Superior Court, supra*, reviews the needs of consumers to have access to class actions, not in spite of, but because of, the smallness of their interest. Says the Court (*ibid.*, p. 808):

> "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. . . . Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial."

The court below, Judge Medina speaking, gives no credence to these considerations. It is respectfully sub-

mitted that the California experience and view, as described by Mr. Justice Mosk in *Vasquez, supra,* is more in the legal inheritance of Federal Rule 23 than the interpretation of Judge Medina.

Class Actions Are Working in California: Examples of How California Courts Are Working With Class Actions.

On April 3, 1973, the Superior Court of the State of California for the County of Los Angeles, consisting of over one hundred different departments, created a special department for class actions, and enunciated as rules of court, a "Manual of the Conduct of Pre-Trial Hearings on Class Action Issues." This manual was prepared by Judge David A. Thomas.[6] It was prepared after public hearings, and a considerable interchange between several judges, and attorneys representing both plaintiffs and defendants in class actions. Amicus attached the Table of Contents and the Foreword by Judge Thomas to the twenty-six page manual as Appendix A, to demonstrate the scope of these rules.

In his foreword, Judge Thomas mentions that certain procedures in the manual have been drawn from Federal Rules of Civil Procedure, Rule 23. The manual was drawn to implement the requirement of *Vasquez* (*supra*) that pragmatic procedural devices be created to simplify the potentially complex class action litigation and protect the rights of all the parties.

This manual of rules represents considerable combined ingenuity from trial judges and trial attorneys. Many of the problems that seem insuperable to Judge

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[6]Before judicial appointment David A. Thomas was defense counsel in *Daar, supra.*

Medina, below, are dealt with by the manual as routine matters for trial court processing.

In terms of manageability, a federal case pending in the Central District of California, demonstrates the viability of class actions. The action is *Harrison E. Hall, et al., Plaintiffs v. Union Oil Company of California, Defendant,* in United States District Court, Central District of California, No. 69-889-ALS and 69-331-ALS. This is a case involving oil spill in Santa Barbara, California, waters. There are common issues of fact and law in the case, and many issues that are not common at all. There are many different subclasses, problems of notice, issues of differing damages, to home owners, commercial operators, fisheries and the like. Judge Albert Lee Stevens, previously a Superior Court Judge in California, has proceeded with management of the case, under Federal Rule 23, with numerous subclasses, mini-trials, and even arbitration hearings. Several kinds of notice were set by the court in manner not unlike the notice procedures used at trial even in *Eisen*. The defendant agreed to pay the cost of notice.

In many ways, the *Hall* case is more complex than *Eisen,* and it is believed the use of class action procedures has saved the courts, litigants, and the public substantial expense.

Another Federal District Court case in California is the case of *Hotel Telephone Charges, Herbert Hafif, et al., Plaintiffs, v. Hilton Hotels Corporation,* MDL Docket No. 89, No. 71,977 MML, involving a suit against a number of defendant hotels and hotel corporations for charging hotel guests a percent of hotel charge to cover the cost of incoming telephone service, whether or not such service is used. The plaintiff class

is approximately forty million patrons. Like *Eisen*, this case is triple-damage antitrust case. The average projected individual recovery was estimated at $2.00. In a twelve-page order dated December 14, 1972, Federal District Judge Lucas held "under Rule 23, Fed. R. Civ. Proc." that the class action was maintainable.[7] Some of the hotel defendants settled by depositing $5,000,000 in the Chicago Federal District Court. Other defendants continued the multi-district-litigation in the Central District of California.

The Los Angeles County manual of class actions, and these cases, are but additional examples of trial courts exercising their special competence in matters thought by Judge Medina, on appeal, to be too complex.

In Class Actions the Due Process Issue Is Fairness of Representation, Not Notice to Class Members.

The concept of notice in Judge Medina's view seems related to the concept of personal jurisdiction over class members, and a requirement of participation of each individual in an action. Out of the procedural failure of these concepts were class actions born. As this Court said in the case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 879 (1921), ". . . class suits were known before the adoption of our judicial system and were in use in English Chancery. . . ." One of the reasons the courts originally developed class actions was to avoid the necessity of having every party in court, so that cases could proceed even though the consist of the class changed. *How v. Tenants of Bromsgrove*, 1 Vern. 22 [1681]

[7]Now on appeal to the Ninth Circuit.

(against the lord of the manor for loss of manorial rights of tenants); *Brown v. Vermuden,* 1 Ch. Cas. 272, 282 [1676] and *Cockburn v. Thompson,* 16 Ves. 321, 328 [1809] (cases involving disputes between vicars and parishioners about tithes, and *Sheffield Waterworks Co. v. Yeomans,* L.R. 2 Ch. App. 8 [1866] (suit by waterworks to determine the rights of 1500 persons claiming damages in bursting of water mains). Said Lord MacNaughten in *Duke of Bedford v. Ellis,* L.R.A.C. 1, 8-11 [1901]:

> "Under the old practice the court required the presence of all parties interested in the matter in suit, in order that final end might be made of the controversy. But when the parties were so numerous that you could never 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party . . . a representative suit was in order. . . . '[quoting Lord Eldon, from *Cockburn v. Thompson, supra*] It was better' he added 'to go as far as possible towards justice than to deny it altogether.' . . . Persons suing on behalf of themselves and all others . . . are before the court. . . ."

Under Federal Rule 23(d), the rules provide that:

> "Notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate. . . ."

The trial court here followed this directive; the Court of Appeals disapproved, and dismissed when plaintiff could not pay the cost of individual notice.

The defendant as well as plaintiff benefits from the class action. The decision may be in plaintiff's favor; but if it is, defendant is protected from multiple litigation. Why should plaintiff pay for notice? Rule 23(d) quite properly makes this a question for trial court determination. On what does Judge Medina base the holding that if plaintiff does not pay for notice, the case is dismissed?[8]

The main reason for notice in class actions, it is submitted, is not so that all the parties may have the due process of a right to be heard, but rather that they may have the due process of a fair trial. This could be provided without notice, under class action law. As is said by James E. Starrs, "The Consumer Class Action," 49 Boston University L.Rev. 407 at 504, the issue is whether the representative "rapidly got . . . in the case wearing his fighting trunks. . . ."[9]

The Los Angeles Superior Court class actions manual, Section 427.6, deals with the necessity for and content of notice. *Inter alia* it states ". . . notice to the class is not necessary in all actions, and an order may be made . . . dispensing with the requirements. . . ." Section

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[8]In the case of *Grossman v. Playboy Clubs International, Inc.*, No. 882,939 in the Superior Court of the State of California for the County of Los Angeles, notice was given by defendant to a national class after the case was settled before entry of judgment. There are cases where the trial court does not require notice. In *Northern Natural Gas Co. v. Grounds* (D. Kan. 1968), 292 F.Supp. 619, the court states, at 636:

> "In *Eisen v. Carlisle & Jacquelin*, the Second circuit states notice is required as a matter of due process in *all* representative actions. With deference, we believe the *Eisen* position is unsound and that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by [the] named parties. Cf. also *Snyder v. Bd. of Trustees of U. of Ill.* (ND Ill. 1968) 286 F.Supp. 927, 12 F.R. Serv.2d 23 l. 3)."

[9]*Cf. Hansberry v. Lee*, 311 U.S. 32, 42, 43 (1940).

427.6(e)(i), (ii), and (iii) requires parties to file a statement as to the time notice should be given, the manner of giving notice, and which party or parties should bear the cost of notice. A copy of said 427.6 is attached as Appendix B hereto.

Conclusion.

Amicus does not intend to brief the many facets of this case. This is undoubtedly being done in-depth by the parties to this appeal.

Amicus believes, however, that the decision by the Court of Appeals below is inconsistent with the plain language of Rule 23 and with the law of class actions as it has evolved, and is contrary to trial court expertise being developed in California and elsewhere.

Amicus further believes that damage will be done to the orderly development of class action litigation in the several states, and particularly in California if the decision below, and Judge Medina's views, are allowed to stand.

Respectfully submitted,

CALIFORNIA TRIAL LAWYERS ASSOCIATION,
By STEPHEN I. ZETTERBERG,
for ROBERT E. CARTWRIGHT,
WILLIAM H. LALLY,
EDWARD I. POLLOCK,
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Amicus Curiae Committee.

APPENDIX A.

Manual for Conduct of Pretrial Proceedings on Class Action Issues

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FOREWORD

This Manual for Conduct of Pretrial Hearings on Class Action Issues states the policy of the Los Angeles Superior Court concerning the procedure by which the Court will hear and determine prior to trial those disputed issues concerning the "class" aspects of the litigation.

This Manual represents the first attempt, so far as we know, to implement the observation of the California Supreme Court in Vasquez v. Superior Court (1971), 4 Cal.3d 800, at 820, that ". . . pragmatic procedural devices will be required to simplify the potentially complex (class) litigation while at the same time protecting the rights of all the parties." Certain procedures herein draw upon FRCP 23 and California Civil Code Section 1781 and the decision thereunder. However, the Manual also provides procedures not elsewhere used for the pretrial determination of class action issues. All the procedures herein, whether they follow earlier practice or are original, were adopted after considerable thought by both the Court and the Bar. This Manual is the product of three earlier drafts which were widely circulated among the judges of this Court and members of the metropolitan Los Angeles Bar; one public hearing also was held. A great number of comments were received concerning each prior draft and after the public hearing; all the comments were carefully considered and many of them constitute the foundation for particular sections of the Manual. The Court thanks those many members of the Bar who offered comments.

No attempt is made in the Manual to take a position on issues of law concerning class actions which are in

dispute. Thus, counsel should not feel precluded from arguing any relevant issue of law through concluding that the Court already has taken a position thereon.

Judge Robert A. Wenke, when he was supervisor of the Law and Discovery Department in 1972, perceived the need for this kind of manual when the several judges in that Department were hearing a variety of pretrial motions in class actions without having satisfactory guidelines to either counsel or the Court for the conduct of said hearing. One benefit from this Manual should be uniformity in the procedure by which class issues are heard and determined prior to trial.

Experience undoubtedly will demonstrate that the Manual should be modified in various ways. The Court intends to reexamine frequently the provisions set out herein and to make modifications as the need becomes apparent.

DAVID A. THOMAS
Judge of the Superior Court

APPENDIX B.

.6 Issue: Necessity for and Content of Notice.

Although as a general rule notice to the class of the pendency of the action shall be ordered, notice to the class is not necessary in all actions, and an order may be made, on motion of a party, dispensing with the requirement that the class be notified of the action. When a public entity or a public officer or public employee in his official capacity is an unnamed member of the plaintiff or defendant class, notice of the motion to dispense with the requirement that the class be notified of the action must be served on said public entity, public officer or employee in the same manner as a civil summons is served.

When one party submits a motion for an order concerning the giving of or dispensing with notice, each party will submit a statement on each of the following (E.g., said party will submit a statement of the proposed contents of the notice (Section 427.6(d) even though he seeks an order dispensing with notice):

(a) Documents, including declarations, if a party desires, of whether the action has great or little merit. (These documents will be considered only as they are relevant to the issues of whether notice should be given, at what time, and imposition of the expense of giving of notice.[5])

(b) A statement discussing whether notice should be given at all.

(c) A statement which assumes that notice will be given and discusses:

(i) The time when notice should be given.

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[5]This parenthetical clause does not apply to actions brought under the Consumers Legal Remedies Act. In said actions CC Sec. 1781(c)(3) will be followed by the court.

(ii) The manner in which notice will be given. This will include a discussion concerning whether said notice should be published, mailed or otherwise brought to the attention of class members. If recommended to be published, it will include the recommended publication media, including an estimate of the cost thereof. It recommended to be mailed, it will include a statement of the manner in which addresses of the class members will be obtained and an estimate of the cost of preparation of the notice and of said mailing. If notice is to be given through other means, a description of said other means will be set out in detail including an estimate of the cost. Each estimate of costs will contain a statement of the factual basis thereof. Each statement also will include an estimate, with the factual basis therefor, of the percentage of the class members which the party believes will receive knowledge of the pending action through use of each notice media.

(iii) The party who should bear the cost of giving the notice or the manner in which the cost thereof should be divided between the parties.

(d) A statement setting out the content of the proposed notice. Each proposed notice will include, at least, a representation concerning each of the following.

(i) Any member who so requests by a specified date may exclude himself from the class and the action by giving notice thereof ("opting out").

(ii) Information concerning how class members who desire to be excluded from the class ("opt out") may give notice thereof.

(iii) The claim of a member who does not request to be excluded from the class will be terminated by the judgment in the action under the rule of **res judicata.**

(iv) Any member who does not request exclusion may move the court for permission to appear as a named class co-representative.

(v) The estimated total amount of the recovery, the anticipated fee which will be sought by counsel for the class, the anticipated other expenses and costs to the class which will be paid from the funds recovered before distribution of the net proceeds to class members, and the net amount to be recovered by each member if the action is successful (a formula statement will be satisfactory).

NOV 29 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION, *AMICUS CURIAE*

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In the

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October Term, 1973

No. 73-203

Morton Eisen, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

Carlisle & Jacquelin and DeCoppet & Doremus, Each Limited Partnerships Under New York Partnership Law, Article 8 and New York Stock Exchange, an Unincorporated Association.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The New York State Trial Lawyers Association respectfully moves for leave to file a brief *amicus curiae* in this case. The petitioner's attorney granted consent to this application by letter, the original of which has been filed with the Clerk. The attorneys for respondents have declined to consent to the filing of this brief.

The New York State Trial Lawyers Association is the largest organization of trial lawyers in New York State. It is the New York affiliate of The Association of Trial Lawyers of America. During its approximately 20-year

existence, this Association has utilized its experience and knowledge to concern itself with various matters affecting the public interest. The right of access to the courts by aggrieved consumers and others seeking to utilize judicial procedures is of particular concern to the Association.

This case involves issues which shall crucially affect the rights of consumers and environmentalists to utilize the federal and state courts to redress wrongs against them. The viability of the class action remedy, or its demise, is the real issue before this court. In view of the broad public interest ramifications transcending the circumstances of this particular case, this Association seeks to present its views.

The Association believes this brief should be of some assistance to the Court in resolving these issues.

Wherefore, it is respectfully requested that the movant's application be granted.

Respectfully submitted,

SHELDON V. BURMAN
Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION *AMICUS CURIAE*

The interest of *amicus* is set out in the Motion for Leave to File, *supra.*

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 479 F.2d 1005.

Constitutional, Statutory and Procedural Rule Involved

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78(f) and 78aa (the "Exchange Act"), and 28 U.S.C. §§1291 and 1292(b).

Statement of Case

This proceeding was commenced in May, 1966 as a class action on behalf of all persons who were compelled to pay an odd-lot (less than 100 shares) differential based on the purchase and sale of common stock listed on the New York Stock Exchange.

Plaintiff's complaint asserts that (i) the two limited partnership stock brokerage firms who are defendants herein, illegally conspired to fix the price of this differential in violation of the federal antitrust laws; (ii) defendant New York Stock Exchange illegally acquiesced in such conspiratorial price-fixing in violation of the Securities Exchange Act of 1934 and its fiduciary obligation to investors.

The complaint requests damages and injunctive relief, including treble damages as to the antitrust claims.

In September, 1966 this action was dismissed as a class action (41 F.R.D. 147). Upon appeal by plaintiff, a motion to dismiss the appeal was denied (377 F.2d 119, *cert. den.*

386 U.S. 1035), in a decision hereinafter referred to as *Eisen I*. The appeal was thereafter decided in March, 1968 (391 F.2d 555), in a decision hereinafter referred to as *Eisen II*.

The *Eisen II* decision reversed the trial court's dismissal of the class action, holding that the action met the requirements of Rule 23(a) F.R.C.P. and was maintainable as a class action under Rule 23(b)(3). The trial court was ordered to conduct further hearings, however, relating to the issues of "notice, adequate representation, effective administration of the action and any other matters which the court may consider pertinent and proper."

On remand, further hearings were held by the trial court on these matters, resulting in decisions by the trial court (50 F.R.D. 471; 52 F.R.D. 253; 54 F.R.D. 565). These decisions held "this suit is a proper class action under F.R. Civ. P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such." (52 F.R.D. 253, 272) The trial court further decided that to the extent that individual claims for damages were satisfied, a "fluid" recovery could be had, *i.e.*, determination of gross damages to the entire class distributed to present class members (52 F.R.D. 253, 264).

On the "cost" question, the court ordered defendants to pay 90% of the cost[1] of the following notice: individual notice to approximately 2,000 class members who had ten or more transactions; individual notice to 5,000 class members selected at random from the over 2,000,000 identifiable class members; notice by publication in various newspapers. Plaintiff's offer to send individual notice to all

[1] 54 F.R.D. 565, 573.

New York Stock Exchange brokerage houses and commercial banks with large trust departments, was noted by the court (52 F.R.D. 253, 267-268). A further suggestion was made by plaintiff that notice could be included in customer's monthly confirmation statements from the New York Stock Exchange brokerage firms.

On interlocutory appeal, the trial court's two orders were reversed (479 F.2d 1005), in a decision and judgment hereinafter referred to as *Eisen III*. The court found, inter alia, that individual notice had to be given to all of the 2,250,000 identifiable class members, notice by publication was a "farce", a "fluid class" recovery was improper, a mini-hearing on allocation of costs improper and that plaintiff had to bear the entire cost of notice. One judge on the *Eisen III* panel concurred in the result based only on the defendants bearing 90 per cent of the cost of notice.

A petition for an *en banc* hearing by the Second Circuit was denied (5-3), as the *en banc* panel considered the case "of such extraordinary consequence" that it wanted to "speed" it "on its way to the Supreme Court". (479 F.2d 1020, 1021) A vigorous dissent was delivered by Judge Oakes, concurred in by Judge Timbers. The dissent found the three-man panel opinion, inter alia, to be "very doubtful to say the least", "on its face to give a green light to monopolies . . . unhampered by any realistic thread of private consumer civil proceedings", and "not merely ossifies, but destroys" class actions (479 F.2d 1020, 1022-1023).

Questions Involved

1. Would dismissal of this class action because of the financial inability of plaintiff to pay the cost of notice violate the constitutional right of class members to have their "day in court"?

2. Is individual notice required to be given to the approximately 2,250,000 identifiable class members, with the cost thereof borne solely by plaintiff?

3. Is notice by publication to class members, pursuant to Rule 23(c)(2) F.R.C.P., constitutionally and statutorily proper?

4. Is it within the equitable powers of the district court to adopt procedures and remedies to disgorge past illegal profits and deter future illegal conduct of wrongdoers so as to effectuate Congressional purposes?

Summary of Argument

The decision to be rendered in this case involves no less than the life, or death, of the class action remedy as a means of vindicating the rights of small claimants who are the victims of mass illegalities.

It is urged in point I that realistic access to the courts is a civil right, protectible by the Due Process Clause of the Fifth Amendment to the United States Constitution. Further, that to deprive the class members of the right to be heard on the merits, because of a dismissal of the class action based on the inability of the named plaintiff, who

has a claim of approximately $70.00, to pay for the enormous cost of notice, is constitutionally defective.

Point II deals with the constitutional and statutory requirements of notice pursuant to Rule 23(c)(2) F.R. Civ. P. On the constitutional level, it is asserted that the crucial factor is adequate representation of the class, not notice of pendency of the action, which is merely for the purpose of permitting class members to opt out.

Moreover, the circumstances in cases of this type render opting out from the class entirely "theoretic rather than practical," because of the small individual claims involved. To require the called for notice would only serve as a destructive force for the class members, not as a source of protection. Only the defendants would benefit. The class members will have no remedy if the concepts of the *Eisen III* decision are followed. The constitutional priorities of the court below would appear awry.

On the statutory level, Rule 23(c)(2) is viewed by *Amicus* as requiring neither of the following: (i) plaintiff to pay for the cost of notice in all cases; (ii) notice in all cases where 23(b)(1) or 23(b)(2)-type actions are involved; (iii) individual notice to all identifiable members of the class regardless of the "circumstances" or whether it is "practicable"; (iv) sending out notice at any particular time. *Eisen III* held to the contrary.

The Court's attention is directed to 28 U.S.C. §1915, which codifies the constitutional principle of access to the courts for all, asserted in point I of this brief.

In summary, to follow the court below, would completely vitiate the intent of Rule 23. As stated by Judge Oakes'

en banc dissent, *Eisen III* "seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to F.R.C.P. 23."

Point III relates to the propriety of a "fluid class recovery." *Amicus* maintains that it is the duty of the courts, and within their power, to adjust their remedies to grant appropriate relief so as to foster the intent of Congressional enactments. Many decisions of this Court champion effective enforcement of the antitrust and securities laws. Their relevance to this action unmistakably indicates that the "fluid class recovery" management technique employed by the trial court and negated by *Eisen III*, is eminently proper. In any event, such technique would appear to only apply to a small minority of the class.

ARGUMENT

I.

The constitutional rights of the class members are violated by denying them realistic access to the courts because of the financial inability of the plaintiff.

Access to the courts at a "meaningful time and in a meaningful manner"[2] is a civil right protectible by the Fifth Amendment to the United States Constitution. "One's day in Court" and "the right to be heard on the merits" is "one of the most fundamental requisites of due process."[3] Obviously, an individual member of the class with a $70.00 claim, as plaintiff herein, challenging monopolistic practices of defendants with enormous financial resources,

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[2] *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

[3] Antineau, Modern Constitutional Law, Secs. 7:13, 7:14; XII Columbia Forum (Summer 1970).

would not have his "day in Court" in a meaningful way, except via the class action remedy.[4]

If the class action procedure may not be availed of by the class members herein, they are rendered remediless. There is no other available method by which the aggrieved class members may redress their grievances which arise from the monopolistic practices alleged. Under such circumstances, the denial of the judicial forum to resolve such claims is a violation of constitutional dimensions. *Boddie* v. *State of Connecticut*, 401 U.S. 371, 376 (1970).

Even where a statute or a rule, such as Rule 23(c)(2) F.R.C.P., is constitutional on its face, if it is applied in a manner which deprives individuals of their protectible rights and forecloses their opportunity to be heard, such rule cannot withstand constitutional scrutiny (*Boddie, supra*, p. 379).

The interpretation placed upon Rule 23(c)(2) by the *Eisen III* court, is clearly a foreclosure of the constitutional rights of the class members to be heard on the merits. Requiring plaintiff to pay the cost of notice and dismissing the class action as a result sounds the "death knell" of the rights of class members (*Eisen I*).[4] Obviously, no court would knowingly add 6,000,000 cases to its trial calendars, nor would defendants welcome such a fusillade of actions.

Moreover, 23(c)(2) notice to the class members merely has the purpose of giving them an opportunity to opt out so that individual members of the class may control their own litigation. Such interest is "theoretic rather than practical" (Advis. Comm. Note, 39 F.R.D. 89, 104), however, in the type of action herein, where the individual claims are too small to warrant individual litigation. The statute of

[4] *Eisen I*, 370 F.2d 119, 120 (1966).

limitations having elapsed is another reason which makes the opportunity to opt out purely "theoretic."

"Civil rules are written to further, not defeat the ends of justice," *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); cf. *Escott* v. *Barchris Construction Corp.*, 340 F.2d 731, 733 (2d Cir. 1965). Where a procedural rule is of a type that "stripped of all real remedy" the prevention and redress of wrongs and the enforcement of contracts, it is constitutionally defective. *Truax* v. *Corrigan*, 257 U.S. 312, 334 (1920). Not only are the "due process" rights of the Fifth Amendment violated in such instances, but "equal protection of the laws," which although not contained in the Fifth Amendment, is embraced by "due process" concepts. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1953).

The decision of the Court below, places fatal restrictions on the prosecution of consumer and environmental class actions, both in federal and state courts, violating the "impossible or impractical obstacle" standards of *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306, 313-314 (1949).

Similarly, the spirit and intent of Rule 23 is vitiated. As stated in *State of Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 (1972), Rule 23 provides:

> "... for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture" (265-266).

There can be no constitutional propriety in any procedure which makes access to the courts dependent upon "the amount of money a man has." *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956); *Lee* v. *Habib*, 424 F.2d 891 (D.C. Cir. 1970).

The foregoing unassailably shows that the construction of Rule 23(c)(2) by Judge Medina in *Eisen III* is unconstitutional. It strips the named plaintiff and class members of any real remedy because of the financial inability of the named plaintiff.

II.

Actual individual notice pursuant to Rule 23(c)(2) to all class members is neither constitutionally nor statutorily required.

A. *Constitutional Requirements.*

The opinion below results in the complete deprivation of any relief to which the class members might be entitled. Ostensibly, the rationale of the decision is that the constitutional rights of the class members are infringed because of less than "perfect" notice. Thus, the "perfect" notice called for becomes the instrument for the most imperfect of remedies, i.e., no remedy. The true purpose of notice, *viz.*, "for the protection of the members of the class and otherwise for the fair conduct of the action" is completely overlooked (Advis. Comm. Note, 39 F.R.D. 69, 107).

To bury the remedy by individual notice inundation is not only unnecessary, but fatal, to the real protection of the class. Such notice is of benefit only to the wrongdoers. The dismissal of the class actions would permit them to retain their ill-begotten gains.

An absurd example of the effect of *Eisen III* is given by Judge Oakes in his *en banc* dissenting opinion. Since the

plaintiff "can never advance the money for notice to, say, all the people in the city phone book, who certainly are identifiable," pollution cases would always be dismissed. Finally, Judge Oakes finds *Eisen III* to be "utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to F.R.C.P. 23" (479 F.2d 1020, 1023).

It is the adequacy of representation which is the constitutional foundation for permitting class actions to bind absent members of the class, not notice. *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940); *Sam Fox Publishing Co.* v. *U. S.*, 366 U.S. 683, 691-692 (1961); 3B Moore's, Fed. Prac. ¶23.55; 7A Wright & Miller, Fed. Prac. & Proc. ¶1786, p. 148; Note, Proposed Rule 23: Class Actions Reclassified, 51 Virg. L. Rev. 629, 639-640; Miller, Problems of Giving Notice in Class Actions, Symposium of Fifth Judicial Circuit, 58 F.R.D. 313, 314-315 (1973); Kaplan, A Prefatory Note, 10 B.C. Ind. & Comm'l L. Rev. 497, 499 (1969); Comment, Adequate Representation, Notice & the New Class Action Rule, 116 U. Pa. L. Rev. 889.

Indeed, under original Rule 23(c)[5] in force from 1938 to 1966, notice was required only as to a "true" class action and only upon dismissal or compromise of the action. No notice at all was required in a "hybrid" or "spurious" class

[5] Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

action (51 Vir. L. Rev. 629, 639, *supra;* 1952 N.Y.S. Judicial Conference Report, pp. 240-241). The present counterparts of the "true", "hybrid" and "spurious" categories are Rule 23(b)(1), 23(b)(2) and 23(b)(3), respectively.

A proposed New York State class action statute is contained in the 1973 Judicial Conference Report of the State of New York. Proposed Section 904 thereof permits notice to be dispensed with entirely, in the following instance:

> "... where notice would be burdensome and costly, the interests of the individual members of the class in controlling the litigation minimal, an effective representation of the class obtainable without notification" (pp. A. 38-39).

It is obvious that the drafters of that section do not deem notice to be a constitutional requirement in class actions. A functional point of view is taken, dependent on circumstances. See: Homburger, 71 Colum. L. Rev. 609, 637-638 (1971).

Even where the class is relatively small, such as the 113 trust funds and beneficiaries thereof, in *Mullane, supra,* notice by publication "in case of persons missing or unknown" (p. 317) was expressly held to be constitutionally proper. Moreover, the question of the "finality" (p. 313) of a decree was there involved. In *Hansberry, supra,* the court was also concerned with finality.

Here, however, it must be kept in mind that this action is still at a preliminary stage. The class members are not bound until judgment is entered. The "finality" of binding

decrees, which was the concern of the *Mullane* and *Hansberry* decisions, *supra,* is not present. Notice pursuant to Rule 23(d)(2) and 23(e) remain to be given.

A fortiori, the notice requirements for this type of case, if any, are based on standards which are much less stringent. For example, in *Hansberry,* the court held that considerations relative to proceeding as a class action "differ from those which must be taken into account in determining whether the absent parties are bound by the decree" (p. 42), within "due process" concepts.

The average class member was found by the trial court to have had approximately five transactions of the asserted illegal nature during the four-year period from May, 1962 through June, 1966. The average odd-lot differential was found to be $5.18 per transaction, amounting to a total differential of $25.90 (52 F.R.D. 253, 257). The *Eisen III* decision assumed a 5 per cent illegal overcharge on this average total differential, or $1.30 per class member actual damages and $3.90 for trebled damages (479 F.2d 1005, 1010).

Common sense would dictate that 6,248,000 claimants with such small recovery possibilities have absolutely no reason for opting out. Their right to opt out would be wholly "theoretic". This is particularly so herein where the Statute of Limitations would bar new actions.

With the opting out benefit of no practical use to the small claimant, or even to the 2,000 class members having ten or more transactions who would be given individual notice, the only benefit of 23(c)(2) notice would be solely to the defendants. Firstly, defendant would be able to obtain a judgment which would be res judicata against all

class members who did not opt out. Secondly, even if res judicata benefits were not derived by defendant, the *stare decisis* authority of any opinion would be most compelling. Thirdly, one-way intervention would be avoided by defendants, i.e., class members could not, as under the old Rule 23, wait until a favorable determination on the merits was made and then intervene. In view of all these benefits accruing solely to the defendants, it is not constitutionally proper to burden the plaintiff with the cost of notice.

In summary, with respect to the 4,000,000 "unknown" members of the class, publication notice is the best notice "practicable" within the *Mullane* doctrine. With respect to the approximately 2,250,000 class members who can be identified with reasonable effort, and the "unknown" members, the following additional notice would be had: (i) individual notice to 5,000 class members selected at random from the identifiable members of that class; (ii) individual notice to all New York Stock Exchange firms; (iii) individual notice to all commercial banks with large trust departments, who would have fiduciary obligations to the beneficiaries of these trusts; (iv) the wide newspaper and other media coverage of this case; (v) individual notice given to approximately 2,000 members having ten or more transactions; and (vi) any notice to be later given under Rule 23(d)(2) and 23(e). The foregoing notice program ensures that all differing opinions, if any, among the class members, will have an opportunity to be asserted.

The trial court has found the 23(a)(4) requirement of "adequate representation" to have been met. This finding has not been disturbed by the Second Circuit opinion below. Since adequate representation is the crucial element to satisfaction of constitutional standards, not notice of pendency

of an action, the notice ordered by the trial court is constitutionally proper.

B. *Statutory Requirements.*

1. Type of Class Action.

The revision of Rule 23 in 1966 had two primary purposes, to wit, (i) avoiding a mutiplicity of suits; and (ii) providing a "means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all" (10 B.C. Ind. & Comm'l L.J. 497, *supra*). This latter purpose has been approvingly and unanimously noted in cases arising from the Second Circuit Court of Appeals,[6] including *Eisen I* and *II*.

Rule 23(a) sets forth four conditions precedent to the maintenance of a class action. These four requirements have all been found to have been met herein and are not challenged by defendants or the *Eisen III* opinion.

Rule 23(b) sets forth three separate categories of actions which may be maintained as class actions upon satisfaction of Rule 23(a) criteria. This action has been found to fall within Rule 23(b)(3), although an analysis of 23(b)(1) and (b)(2) reveals, on its face, that this action may be maintained under either 23(b)(1)(B) or 23(b)(2). Certainly, a determination of the propriety of the challenged monopolistic practices "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication," either on *res judicata* or *stare decisis* princi-

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[6] *In re Antibiotic Antitrust Actions*, 333 F.S. 278, 282-283, 289 (S.D.N.Y., 1971), *mand. den.*, 449 F.2d 119 (2d Cir. 1971); *West Virginia* v. *Charles Pfizer*, 440 F.2d 1079, 1090 (2d Cir. 1971), *cert. den.* 404 U.S. 871 (1971); see also: 7A Wright & Miller, Fed. Proc. & Prac. §1782, p. 103.

ples. At the very least, a decision on the merits would "substantially impair or impede their [class members] ability to protect their interests." Under such circumstances, class action relief is appropriate under 23(b)(1)(B).

The substantive antitrust and securities issues herein are either legal or illegal. Each of the members of the class would be identically affected by these issues. The measure of damages with respect to members of the class would likewise be identical. The only individual issues involved would be the exact amount of damages sustained by each of the class members. Differences of this type, however, would in no way affect the substantive liability questions. Indeed, summary judgment pursuant to F.R.C.P. Rule 56 may be granted, notwithstanding open questions as to the damages sustained.

Even if, *arguendo,* Rule 23(b)(1)(B) were not appropriate, this action would properly be maintainable under 23(b)(2) for declaratory and injunctive relief, together with incidental monetary damages and restitution. Advis. Comm. Note 39 F.R.D. 69, 102; *Almenares* v. *Wyman,* 453 F.2d 1075, 1086 (note 15a), *cert. den.* 405 U.S. 944 (1972); 7A Wright & Miller, *supra,* §1775.

Further flexibility in resolving the common substantive issues is provided for in 23(c)(4), in the following manner.

> "(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

In a recent case *Katz* v. *Carte Blanche,* —— F.2d ——, (3d Cir. 1973), 17 F.R. Serv. 2d 279, the liability and damage issue were separated in the above manner. The controlling common liability issue was first to be determined with the damage question to be resolved thereafter. As stated by the court:

> "Clearly, the controlling question of law as to defendant's liability in this case is readily amenable to disposition by class suit. The question of defendant's liability under the Act (Truth-in-Lending) involves a single determination of law. Thus, the task facing a court in making the threshold determination is essentially the same whether one plaintiff be involved or whether a class of 800,000 be involved. The additional managerial tasks forced upon a court are more than offset by the judicial economy realized in disposing of the controlling legal issue in one consolidation proceeding" (p. 282).

Judge Oakes in the *en banc* opinion in this case (479 F.2d 1020, 1023), suggested such an approach, among others, to prevent the unnecessary "burial" of this action while viable alternatives existed.

2. Limited Notice Requirement.

Rule 23(c)(2) requires notice to be given to class members *only* in class actions "maintained under subdivision (b)(3)." If this action is maintainable under Rule 23(b)(1) or (b)(2), as set forth above, notice at the pleading stage in the proceeding is not required under the statute. The court below (*Eisen II*), however, *in dictum,* stated that notice is constitutionally required in all class actions. For all of the reasons more particularly set forth in point I, *supra,* this

view is in error. Additionally, various courts have expressly rejected this view and dispensed with 23(c)(2) notice entirely. *Hammond* v. *Powell,* 462 F.2d 1053, 1055 (4th Cir. 1973); *Northern Natural Gas Co.* v. *Grounds,* 292 F.S. 619, 636 (D. Kans. 1968), af'd oth. gds. 441 F.2d 704 (10th Cir. 1971); *Francis* v. *Davidson,* 340 F.S. 351, 361 (D. Md. 1972); *Bowen* v. *Hackett,* Civil Action No. 5038 (D.C. R.I., Order dated May 10, 1973).

3. Type of Notice.

Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

The court below interprets the latter phrase of the rule, starting with the word "including," as mandating that perfect notice be given, i.e., actual individual notice to each and every one of approximately 2,250,000 identifiable class members. Under this view, such notice is required regardless of the "circumstances" and without consideration of whether such notice is "practicable" or not, or the purpose of such notice.

There is nothing in the legislative history of Rule 23 to require such a niggardly, delimiting construction of the word "including". The whole format of Rule 23 is one geared to flexibility and judicial inventiveness. The word "including", within the intendment of Rule 23, and as an essential remedial procedure for the enforcement of the antitrust and securities laws, and other consumer-oriented legislation, should not be considered as a word of limitation, but "simply as an illustrative application of the general principle." Cf., *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941).

Similarly, this Court in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177 (1940), so interpreted an unfair labor practice provision of the National Labor Relations Act. This provision called for "affirmative action, including reinstatement of employees." It was held that such language did not mean that only former employees were within its coverage. The Court (Frankfurter, *J.*) rejected defendant's limiting interpretation of the word "including", in the following language:

> "To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. . . . The word 'including' does not lend itself to such destructive significance" (p. 189).

The word "including" in 23(c)(2) is merely illustrative of one type of notice which may be given, dependent upon the "circumstances." The cases supportive of this view include:

> *Wyman* v. *Lopez,* 329 F.S. 483, 486 (W.D.N.Y. 1971), af'd no op., 404 U.S. 1055 (1972):
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> (Notice to class members via posting of signs in local social service departments, although names and addresses of all class members known.)
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> *"Drug" Cases, supra, West Virginia* v. *Pfizer,* 440 F.2d 1079, 1090:
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> (Notice by publication to consumers of drugs, although large segments of the class were identifiable.)
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> *Nolop* v. *Volpe,* 333 F.S. 1364 (D.C.S.D. 1971):
>
> (Notice by publication in college newspaper and TV and radio station, although names and addresses of all students known.)

In any event, even if such notice were required, the individual notice to approximately 7,000 members of the class would meet such stringent requirements. Hence, an appropriate subclass under Rule 23(c)(4) would be created.

Dismissal of the class action would consequently not be warranted as to these 7,000 class members, nor the approximately 4,000,000 unidentifiable class members who would receive notice through publication, media coverage, New York Stock Exchange firms or from the trust departments of large commercial banks, or those who would receive notice through their monthly brokerage firm statements.

4. Timing of Notice.

Rule 23(c)(2) does not state when the required notice should be sent out. In the within action, for example, this notice has still not been sent out, although the action was commenced in 1966. The class members would not be prejudiced, however, since they could exclude themselves from whatever date was set forth in the notice eventually sent (See: Miller, *supra,* 58 F.R.D. 313, 317). However, as a practical matter, since the Statute of Limitations would foreclose any new actions, the likelihood of opting out by class members, the purpose of 23(c)(2) notice, would undoubtedly be the product of either ignorance or mistake.

The failure of any class members to intervene, or opt out, during this seven-year period, despite this case being well known to the financial community and to the public through extensive media coverage, is reflective of the theoretic nature of 23(c)(2) notice. When the notice issue at bar is viewed in this light, the perfect notice called for by the court below appears wholly unrealistic and only conducive to gross violations of consumers' rights.

5. Cost of Notice.

Rule 23(c)(2) does not state who shall bear the cost of notice. 1B Moore, Fed. Prac., §1.45 (Manual for Complex Litigation), states on this issue as follows:

> "Rule 23 is silent on the cost of preparing and distributing the required (c)(2) notice. This is an appropriate area for the exercise of the court's discretion, 'having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive). . . .'"

In the within action, as discussed above, the benefits of notice accrue only to defendants. Further, the probability of success of plaintiff in this action has been found by the trial court, after extensive hearings, to be so compelling that 90% of the cost of notice was allocated to the defendants (54 F.R.D. 565). The trial court has properly exercised its discretion.

The apportioning of the cost of notice is not unusual. There is substantial authority for such allocation. *Dolgow* v. *Anderson,* 43 F.R.D. 472 (E.D.N.Y. 1968); *Rothman* v. *Gould,* 52 F.R.D. 494 (S.D.N.Y. 1971); *State of Minnesota* v. *U.S. Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968); *Berland* v. *Mack,* 48 F.R.D. 121 (S.D.N.Y. 1969); *Feder* v. *Harrington,* 52 F.R.D. 178, 184 (S.D.N.Y. 1970); *Miller* v. *Alexander Grant & Co.,* 1971-72 Fed. Sec. L. Rep. ¶93,287 (E.D.N.Y. 1971); *Mack* v. *General Electric Co.,* Civil Action No. 69-2653 (E.D. Pa., Order of September 7, 1971); *Lamb* v. *United Security Life Company,* 1971-1972 Fed. Sec. L. Rep. ¶93,489 (S.D. Iowa 1972); *Ostapowicz* v. *Johnson Bronze Co.,* 54 F.R.D. 465, 466 (W.D. Pa. 1972); Note, Class Actions, Cost of Notice, 1973 Wisc. L. Rev. 301.

Another factor warranting that the cost of notice be borne by defendants, is that such costs are "ordinary and necessary" expenses deductible by defendants for income tax purposes, pursuant to 26 U.S.C. 162(a). See: *Commissioner of Internal Revenue* v. *Tellier,* 383 U.S. 687 (1966); *Commissioner of Internal Revenue* v. *Heinger,* 320 U.S. 467 (1943).

One other factor militates against plaintiff being asked to bear the cost of notice. It is provided by statute (28 U.S.C. §1915), as follows:

> "(a) Any court of the United States may authorize the commencement, prosecution, or defense of any suit action or proceeding, civil or criminal, or appeal thereon, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such cost or give security therefor . . .".

It is clear that the plaintiff is "unable to pay" the cost of notice required by the court below to proceed with the prosecution of this action. The constitutional infirmities of depriving class members of access to the courts because of mere financial inability, urged in point I, *supra,* has been codified by the aforesaid statute.

III.

A fluid class recovery is eminently proper as an exercise of the Court's general equitable powers, pursuant to Rule 23, and to foster the remedial intent of the antitrust and securities laws.

The Federal Courts have the power to "adjust their remedies so as to grant the necessary relief where federally secured rights are invaded", and indeed it is "the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose". *J. I. Case & Co.* v. *Borak,* 377 U.S. 426, 433 (1964); *Mills* v. *Electric Auto-lite Co.,* 396 U.S. 375, 391 (1970); *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 288 (1940); *S.E.C.* v. *Manor Nursing Center, Inc.,* 485 F.2d 1082, 1104 (2d Cir. 1972); *University of Southern Calif.* v. *Cost of Living Council,* 472 F.2d 1065 (T.E.C.A. 1972), *cert. den.,* 93 S. Ct. 1364 (1973).

If this action cannot proceed as a class action, it is a "green light" for monopolists, consumer defrauders and polluters. Consumers would have no remedy against mass illegalities, in the state or federal courts. Disrespect for the rule of law would thereby be engendered and illegality encouraged. The common law equitable power of a court to deal with class actions, even before Rule 23, to prevent a "failure of justice," was enunciated by this court 120 years ago. *Smith* v. *Swormstedt,* 57 U.S. 288, 302 (1853).

This Court in a long line of cases, has championed the effective enforcement of antitrust and securities laws. E.g., *Hanover Shoe Co.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Zenith Radio Corp.* v. *Hazeltine Research,*

Inc., 395 U.S. 100 (1969); *Perma-Life Muffler, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134, 138-139 (1968); *Affiliated Ute Citizens* v. *U. S.*, 406 U.S. 128 (1972).

In *Hanover Shoe Co., supra,* this court went beyond the "fluid class recovery." It allowed recovery from the antitrust wrongdoer even where no damage at all may have been sustained, as the additional monopolistic costs may have been passed on to the ultimate consumer (p. 494). The rationale: To do otherwise would have allowed the wrongdoer to violate the law with impunity.

The difficulty of ascertaining damages in antitrust cases has not deterred this Court from fostering the strong public policy underlying the antitrust laws. As stated in *Bigelow* v. *R.K.O. Radio Pictures,* 327 U.S. 251 (1946):

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (p. 264).

The Second Circuit, in other opinions contrary to the panel below, has expressly permitted "fluid class recovery". *In Re Antibiotic Antitrust Actions* and *West Virginia* v. *Pfizer, supra.* There is ample other authority for this procedure.[7]

As stated by Judge Lord (333 F.S. 278, 282) in the *Antibiotic Antitrust Actions, supra,* defendants "wrongfully conclude that no remedy is better than an imperfect one." Otherwise, wrongdoers would "freely engage in predatory price practices . . . " (p. 282). See also: Miller, Problems

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[7] *Bebchick* v. *Public Utilities Comm.*, 318 F.2d 187 (D.C. Cir., en banc), *cert. den.* 373 U.S. 913 (1963); *Daar* v. *Yellow Cab Co.*, 67 Cal.2d 695, 433 P.2d 732 (1967); *Miller, infra,* 54 F.R.D. 501, 512-513.

in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3), 54 F.R.D. 501, 512-513 (1972); Weinstein, Some Reflections on the "Abusiveness" of Class Actions," 58 F.R.D. 299, 305 (1973).

Rule 23 provides no guidance on the "management" problem, i.e., the ascertaining and distributing of damages. It merely sets forth that this element be one of the considerations taken into account by the trial court (Rule 23(b)(3)(D) in a 23(b)(3)-type class action. The Advisory Committee Note, *supra,* likewise provides no enlightenment on this issue. Most assuredly, there is nothing in Rule 23 itself which bars the use of a "fluid-class recovery" technique to handle management problems.

On the other hand, there is ample support for a flexible, inventive and liberal construction of Rule 23, a strong public policy to effectively enforce the antitrust and securities laws and permitting courts to adopt remedies which would foster the intent of federal legislation. As a deterrent to future illegal conduct and to prevent illegality from being profitable, the wrongdoers must be disgorged of their tainted profits. Plaintiff is acting as a private attorney general for this purpose.

In the within action, 56% of the challenged transactions have been found to be on computer tapes, which can precisely identify the individual transactions (52 F.R.D. 253, 257). Of the remaining 44% of the class, fluid class recovery would only be necessary to the extent that individual claims were not subsequently satisfied. Thus, the fluid-class recovery technique would only apply to a minority of the class members. As between the bilked and the bilker, judicial remedies to prevent injustice are entirely within the power of the trial court and to be encouraged, not criticized.

CONCLUSION

It has been estimated by U. S. Senator Philip Hart, Chairman of the U. S. Senate Subcommittee on Antitrust & Monopoly Legislation, that consumers, through "fraud and deception in the marketplace" are illegally bilked of "$174 to $231 billion each year." [8]

The magnitude of this consumer bilking displays the urgent need for effective class action enforcement of the antitrust and other consumer laws. Constitutional requirements of "due process" mandate access to the courts on a realistic basis. To deprive the consumer of a judicial remedy, which the dismissal of this class action would surely do, would be tantamount to legalizing illegality. Both state and federal court proceedings would be so affected.

For the reasons stated above, the decision and judgment of the United States Court of Appeals for the Second Circuit (*Eisen III*), should be reversed.

Respectfully submitted,

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Dated: November 29, 1973

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[8] 116 Congress Rec., April 28, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, On Behalf Of Himself And All Other Purchasers And Sellers Of "Odd-Lots" On The New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, URGING REVERSAL, AND BRIEF FOR THE AMICI CURIAE PUBLIC CITIZEN AND CONSUMERS UNION OF UNITED STATES, INC.

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, URGING REVERSAL

Public Citizen and Consumers Union of United States, Inc. hereby move this Court under Rule 42 of this Court for leave to file a brief *amicus curiae* urging reversal of the decision of the United States Court of Appeals for the Second Circuit, which is now reported at 479 F.2d 1005. The consent of the parties to file such brief has been sought and was orally given by petitioner but was refused by respondents.

Public Citizen and Consumers Union are non-profit corporations supported by the public. They engage in a wide variety of consumer activities both in the courts and before regulatory bodies. Attorneys on their staffs represent consumers in various legal proceedings, including class actions. Attorneys from Public Citizen represent the plaintiff class in one such action, *Ditlow v. Pan American World Airways, Inc. et al.*, No. 73-1936, D.C. Cir., in which a class of approximately 600,000 transpacific air passengers is seeking to recover damages for alleged violations of the Federal Aviation Act and the Sherman Antitrust Act. The outcome in the instant case may well as a practical matter determine whether the passengers in *Ditlow* will be effectively precluded from recovering their damages, the likely result if the decision of the Second Circuit is sustained by this Court.

This case is of extreme importance to the future of consumer class actions brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and thus should be decided only after consideration of a variety of views on the issues presented. Yet, because most of the judicial treatment of these questions has arisen in the Second Circuit from which this case comes, alternate approaches to the problem cannot be supplied, as in many other cases, by other Courts of Appeals which have considered the matter. Accordingly, it is particularly appropriate that persons likely to be affected by the disposition of this case be permitted to present their views as *amici*.

Moreover, both the lower courts and the parties have dealt with this case primarily in terms of whether personal notice, paid by the plaintiff, is required, and whether the procedure utilized by the District Court to limit personal notice and to allocate the costs of notice based on

probability of success, is authorized by Rule 23 and due process. Our brief will suggest that there is an alternative procedure available, which is unlikely to be fully discussed by the existing parties, and which will permit this case to proceed to the merits without imposing undue costs on anyone and without violating the rights of any person under the Constitution or Rule 23.

The position taken in our brief is that, while Rule 23(c)(2) admittedly requires that at some time personal notice be given to all members of a Rule 23(b)(3) class who can be reasonably identified, nothing in that Rule or in the concept of due process requires that the personal notice be given at the plaintiff's expense at the time that the class is certified. We suggest that a more generalized form of notice at the initial stage, followed by individual notice to identifiable class members at the time that liability has been established against the defendants, comports with the letter and spirit of Rule 23 and affords due process to the members of the plaintiff class and to the defendants. This solution will both minimize unnecessary notice costs and still insure that the legitimate interests of the named plaintiffs, the remaining members of the class, and the defendants are not sacrificed. If such procedures are followed, class actions under Rule 23(b)(3) can be maintained without undue burdens to anyone.

This position, which is more fully discussed in our brief, has not been and is unlikely to be briefed by the existing parties. We believe that it is desirable for the Court to have before it all of the reasonable alternative approaches to Rule 23 before it decides under what conditions consumer class actions may be maintained. The brief of Public Citizen and Consumers Union will discuss one alternative that is otherwise unlikely to be presented, and

it is primarily to bring this alternative before this Court that leave to file a brief *amicus curiae*, urging reversal, is sought.

Respectfully submitted,

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November 29, 1973

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMICI CURIAE PUBLIC CITIZEN AND CONSUMERS UNION OF UNITED STATES, INC.

INTERESTS OF THE AMICI CURIAE

Public Citizen is a non-profit corporation supported entirely by donations from the public. It engages in a wide variety of consumer activities both in the courts and before regulatory bodies. Attorneys on its staff represent consumers in various legal proceedings, including class actions. Its attorneys represent the plaintiff class in one

such action, *Ditlow v. Pan American World Airways, Inc., et al.*, No. 73-1936, D.C. Cir., in which a class of approximately 600,000 transpacific air passengers is seeking to recover damages for alleged violations of the Federal Aviation Act and the Sherman Antitrust Act. On a single damages basis, the recovery per person will average more than $40 in that case.[1] A copy of the complaint is reproduced as Appendix A to this brief. In *Ditlow* the District Court, without opinion, granted the defendants' motion to dismiss based upon the alleged exclusive jurisdiction of the Civil Aeronautics Board over the matter, even though it was conceded the Board had no power to award plaintiffs any damages. If plaintiffs are successful on their pending appeal from that ruling, they will be faced with similar class action problems to those involved in the instant proceeding. Therefore, the outcome in this case may well as a practical matter determine whether the passengers in *Ditlow* will be effectively precluded from ever recovering their damages.

The *amicus* Consumers Union of United States, Inc., is also a non-profit organization which engages in a variety of activities to advance the interests of consumers in the courts and before regulatory agencies, including the bringing of class actions. The outcome of this case may also have a direct bearing on the right of some of the more than 375,000 members of Consumers Union to obtain recoveries as a result of class actions which are either now pending or may be brought in the future.

Both the lower courts and the parties have dealt with this case primarily in terms of whether personal notice,

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[1] This is based on a passenger who flew between the West Coast and Japan, coach class, round trip, and without any special fare reductions.

paid by plaintiffs, is required and whether the procedure utilized by the District Court to limit personal notice and to allocate the costs of notice based on probability of success, is authorized. In our view there is an alternative procedure available under Rule 23 that will permit this case to proceed to the merits without imposing undue costs on anyone and without violating the rights of any person under the Constitution or Rule 23. It is because this alternative is unlikely to be fully discussed by the existing parties that *amici* are filing this brief.

SUMMARY OF ARGUMENT

The decision of the Second Circuit, which is now reported at 479 F.2d 1005, approaches Rule 23 in a wholly unrealistic manner, and by doing so has stripped all life from consumer class actions brought under Rule 23(b)(3). The result of the ruling by the Court of Appeals is to make it virtually impossible, as a practical matter, to bring significant consumer class actions under that provision because no plaintiff will ever advance the staggering costs which the Court of Appeals has said he must pay. In fact, the more important the action – *i.e.*, the greater number of consumers who were injured by the conduct of the defendant – the less likely it is that the action can be maintained under the appellate court's construction of Rule 23. In reaching that construction, the Court erroneously supported its position by references to concepts of due process without an appreciation that due process is a relative concept, and that the alternatives must be fully considered before deciding that due process requires individual notice to every person as soon as the class has been certified. Furthermore, the decision below suggests that, because the judgment may run into "astronomical amounts,"[2] the

[2] 479 F.2d at 1019.

result is somehow unfair to the defendant who otherwise would be permitted to keep his unlawfully obtained profits.

The decision of the Court of Appeals, which undoubtedly will leave millions of injured persons in this and other cases without a remedy, apparently rejects other procedural alternatives which would insure that the rights provided by this Court under Rule 23(b)(3) are more than theoretical ones. While Rule 23(c)(2) admittedly requires personal notice to all members of a (b)(3) class who can be reasonably identified, nothing in that Rule or in notions of due process requires that the personal notice be given at the plaintiff's expense, at the time that the class is certified. We believe that a more generalized form of notice at the initial stages, followed by individual notice to identifiable class members at the time that liability has been established against the defendants in favor of the plaintiffs, comports with the letter and spirit of Rule 23 and affords due process to the members of the plaintiff class and the defendants. This solution will both minimize unnecessary notice costs and, at the same time, insure that the legitimate interests of the named plaintiffs, of the remaining members of the class, and of the defendants are not sacrificed. If such procedures are followed, class actions under Rule 23(b)(3) can be maintained without an undue burden on anyone. If not, consumers will be required to seek remedial legislation to protect their interests. [3]

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[3] *Amici*'s position in this brief is necessarily limited to Rule 23 as it is presently constituted. It should not be construed as an endorsement of certain limitations on class actions in that Rule and in the Judicial Code. *Amici* believe that those limitations should be removed, albeit not by litigation.

ARGUMENT

I. RULE 23(c)(2)'s REQUIREMENT OF PERSONAL NOTICE DOES NOT MANDATE THAT IT BE PROVIDED IMMEDIATELY AFTER THE CLASS IS CERTIFIED

The decision of the Court of Appeals requires that personal notice be given to all persons who can reasonably be identified as members of the class. Moreover, and this is by far the more serious problem, it requires that notice be paid for by the plaintiffs and that it be given when the class is certified and before any further proceedings take place. We agree with the Court of Appeals that the language in Rule 23(c)(2) is clear and that before any distribution, that Rule requires that personal notice be given at some time to each member of the plaintiff class who can reasonably be identified. Thus, where liability has been established, known class members, who have apparently valid claims against a defendant, cannot be denied the opportunity to prove their claims because of an "assignment" of their recovery to members of the fluid class, absent specific legislation authorizing such a procedure. Surely, when we are dealing with a situation in which liability has been established, and not merely the beginning of a lawsuit, where a possibility of recovery exists, an effort must be made to notify class members before making an assignment of their recovery to a fluid class. To the extent that the position of the plaintiff in this case suggests otherwise, we must disagree.

However, the decision of the Court of Appeals did not merely rule that notice must be given to known members of the class prior to distribution. The Court held that such notice must be given immediately after class certification and must be paid for entirely by the plaintiff, except

perhaps in the few cases in which the defendant is in regular communication with members of the class for other reasons (*e.g.*, a corporation and its stockholders).[4] If this Court affirms that determination, it will have eliminated almost all significant consumer class actions under Rule 23(b)(3) for the simple reason that there will be no plaintiff who will advance the amount of money necessary to provide notice to thousands of individuals.

This result would obtain, even were the individual plaintiff a millionnaire, since in order for him to finance the suit, he must be not only rich but foolish. No rational plaintiff would ever put up the several hundred thousand dollars required to provide individual notice to every member of the class in this case[5] because at best, if the lawsuit were successful, he could recover only those costs, less the interest lost for the considerable period of time which the case would undoubtedly take to reach its conclusion. Moreover, if defendants prevailed, the entire expense would be lost. In short, a plaintiff is in a situation in which he is being asked to put forth an enormous amount of money, all of which he may lose, and with no opportunity to do any more than recoup his capital, less lost interest on it. There simply will be no one who will do that.

The only person who might make such an investment (because of the possible realization of legal fees if the

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[4] See 479 F.2d at 1009 n. 5. In that case plaintiff might only have to pay the added charge of including the notice, rather than the cost of the entire mailing.

[5] The cost of notifying the 2,250,000 identifiable members of the plaintiff class in this case is estimated to be $500,000. See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 263 (S.D.N.Y. 1971).

action is successful) is the plaintiff's attorney. He at least has the *possibility* of realizing a profit, albeit at considerable risk. However, Disciplinary Rule 5-103(B) of the Code of Professional Responsibility prohbits a lawyer from advancing or guaranteeing the expenses of litigation unless the client remains ultimately liable for such expenses. Since no client would obligate himself for such expenses, the possibility of a lawyer advancing the necessary funds is unlikely to materialize.

II. REQUIRING PERSONAL NOTICE ONLY AFTER LIABILITY IS DETERMINED WILL ENABLE CLASS ACTIONS UNDER RULE 23(b)(3) TO PROCEED ON THE MERITS WITHOUT PREJUDICING THE RIGHTS OF ANY PERSON

A. An Alternative Approach To The Problem Of Personal Notice

In part, the problem stems not from the requirement that plaintiff must pay for personal notice, but that he do so at the time that certification of the class is granted when there is a considerable risk that those costs will never be repaid. On the other hand, incurring such costs after the issue of liability has been determined in favor of the plaintiffs would not be a foolish act and would be fully justified in order to insure that individual members of the class have an opportunity to recover their damages personally. It should be noted that Rule 23(c)(2) itself does not mandate immediate personal notice to all members of the class who can be reasonably identified. In contrast to Rule 23(c)(1), which directs that a determination of whether the action may be maintained as a class shall be made "[a]s soon as practicable after the commencement of an action brought as a class action," there is no requirement

of immediacy under Rule 23(c)(2).[6] Therefore, we believe that, while individual notice is required at some point in the proceedings, nothing in the Rule or, as we shall show below, in the concept of due process, requires that notice be given at this stage of the proceedings.

In our view, the best way to reconcile the varying interests of the named plaintiffs, the remaining members of the plaintiff class, and the defendants in these kinds of cases, is to defer any required personal notice until after the liability issue is determined. However, we believe that some notice ought to be required as soon as practicable after the certification of the class takes place. This notice would be of a general type, such as publication in a few appropriate newspapers or magazines, designed to reach some members of the class. In this case, for example, notice could have been given for an estimated $21,720 which would have included large advertisements in major newspapers and individual notice to some 2,000 persons who appear to have the most significant interest in the proceeding as well as to 5,000 random members of the class.[7] While we believe that those costs, borne entirely by the plaintiffs, would be prohibitive in many cases, the figure is of a radically different order than the several hundred thousand dollars required to notify 2,250,000 members of the class, and thus it at least makes notice a possibility.

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[6] According to the Advisory Committee Notes accompanying Rule 23, the purpose of the requirement for a prompt ruling on the status of the action as a class action is "to give clear definition to the action . . ." 39 F.R.D. 98, 104 (1966). That purpose is obviously not relevant to the notice problems to individual class members under Rule 23(c)(2).

[7] See *Eisen v. Carlisle & Jacquelin, supra*, 52 F.R.D. at 263, 267-268.

The objectives to be achieved by this notice would include the assurance that persons with significant interests in the proceeding, as opposed to the multitude of individuals who will have very small interests and will not desire, for economic reasons, to assert them individually, can make their views known to the court. The returns from such notice may also reassure the court in its determinations that the named plaintiffs are adequately representing the class and that their claims are typical, as required by Rule 23(a). Such notice would also provide the opportunity for members of the class to opt out although, as Professor Kaplan has pointed out, the right to opt out and proceed on one's own is "no more than theoretic where the individual stake is so small as to make a separate action impracticable." B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967). Because some of these benefits may accrue, the effort of giving this notice should be undertaken. However, such generalized notice is unlikely to reach a significant number of members of the class, and thus the number of persons who obtain actual notice and decide to be represented by other counsel will be reduced. But since the alternative is no proceeding at all, Rule 23 must be read to permit this procedure, or there will be virtually no consumer class actions under Rule 23(b)(3).

After the general notice is given, the claim of the named plaintiff would then be litigated on the merits. In a great many of these cases, the issues are entirely ones of law with the outcome turning upon the interpretation of the relevant authorities. For instance, in *Ditlow v. Pan Am, supra,* there is no dispute that all of the defendant airlines agreed to impose the same 5% fare increase on every transpacific passenger

from May 1 – July 19, 1973. Hence the outcome of the case will turn upon the issues of law which are common to every member of the class – whether the Federal Aviation Act provides antitrust immunity on the undisputed facts of that case. The same kind of situation would obtain in class actions involving unlawful interest charges,[8] or in cases claiming an unlawful failure to pay interest on escrow tax payments made to a mortgagee with a monthly mortgage payment and held by it until the tax payment is due.[9] As soon as the liability issue is determined, an immediate appeal could be taken by the losing party.[10]

Regardless of who wins in the district court, the basic issues in the case would be decided in the court of appeals, and perhaps in this Court, before any individual notice would be sent to any member of the plaintiff class, except insofar as the district court decided it was advisable to notify a few individual members as part of the initial, general notice. If the defendants were victorious on the liability question, the only expenses of notice would be the relatively minor amounts necessary to give the general, pre-liability notice. On the other hand, if plaintiffs were judged to be correct on the liability issue, the matter

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[8] See *Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972).

[9] See *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7 (D.D.C. 1973).

[10] If plaintiff prevailed, it would be necessary either to ascertain his damages or grant injunctive relief so that a final order with respect to one of his claims could be entered and a direction entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure making the decision appealable.

would be referred back to the district court to ascertain the damages sustained by each member of the class. Only then would notice be sent under Rule 23(c)(2) to each individual member who could be identified. Thus, those class members whose financial stakes in the lawsuit are so small that the rights to opt out and appear through their own counsel are meaningful only at this stage, would have those interests protected, as provided in Rule 23(c)(2).

It is only after distribution is made to all known class members that it will be necessary for the court to consider what should be done with respect to those members of the class who cannot be readily identified. That question is one of substantive law, as the respondents concede in their statement of the questions presented on the petition for *certiorari*.[11] It is not a question under Rule 23, but in this case, for example, a question under the antitrust and securities laws and general principles of equity. Thus, the court would be required to determine whether, because of problems in locating individual members of a class, the defendant should be permitted to keep the damages, or whether as this Court held in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), there must be "some way in which damages can be awarded where a wrong is done."[12] We believe that there will be a proper way found under the applicable substantive principles at

[11] See Respondents' Brief and Supplemental Appendix In Opposition To Petition For Writ Of Certiorari, p. 1.

[12] It is apparent that the possibility of injunctive relief will not suffice to deter would-be violators. For example, in this very case, the complaint was filed on May 2, 1966, and on July 1, 1966, the complained of practices were changed, petition for writ of certiorari at 2 and 8, n. 2.

the appropriate time to insure that the damages are not kept by the adjudicated wrong-doer, but that is a matter which this Court need not reach at this time since the ability to distribute damages to unknown class members does not relate to the question of whether immediate personal notice must be given to known members by the named plaintiff.

B. Neither Rule 23 Nor Due Process Precludes This Alternative Approach

Against this rather common sense approach to the problem, two separate sets of objections might be made. The first of these is that Rule 23 does not authorize any such procedure, and hence it cannot be permitted. The answer to this is that nothing in Rule 23 specifically precludes it, and unless some procedure of this type is developed, consumer class actions under Rule 23(b)(3) will simply fall by the wayside, a result which the framers of that Rule could not have intended.

The second objection, and one which the Court of Appeals found compelling, is that "due process" precludes any procedure which does not include individual notice to members of the class before any action is taken on the merits. While it is undisputed that the notice provisions of Rule 23 were included to insure procedural fairness,[13] procedural fairness was never intended to be construed in so inflexible and all-encompassing a manner as to eliminate significant consumer class actions brought under Rule 23(b)(3) and thereby to deny rights that the substantive law created. As this Court has held, the

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[13] See Advisory Committee Notes, 39 F.R.D. 98, 99, 103 (1966).

concept of due process is a relative one and must be evaluated in light of the relevant circumstances. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Therefore, we must ask what alternatives are there to the proposed procedures outlined above, and do they provide greater procedural fairness and protection to the two groups of people most affected – the members of the plaintiff class and the defendants.

The alternative which the Court of Appeals held to be required by Rule 23 (making the plaintiff pay all of the costs in advance) is no real alternative since it will require the dismissal of almost every consumer class action brought under Rule 23(b)(3). On the other hand, requiring the defendants to pay the cost of personal notice in advance would equally be unfair since they would have no realistic chance of recovering those costs even if they prevail on the merits. Thus, neither of these alternatives presents a realistic solution to the problem, regardless of whether the mini-hearing is employed, if the costs involved are those of giving personal notice to all known class members. [14]

Moreover, viewed on its own terms, the proposal is fair to both members of the plaintiff class and to the defendants. It cannot be denied that the absence of personal notice limits the opportunities for members of the plaintiff

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[14] If the costs of general notice are relatively significant, the mini-hearing should be used to determine how to allocate the costs of that notice in order to insure that even those costs don't overwhelm a plaintiff with a meritorious case. While nothing in the Rules specifically authorizes a mini-hearing, nothing prohibits it either. It would be a sad day for justice in the federal courts if district judges were limited only to the specific procedural devices spelled out in the Rules in handling new and complex problems of judicial administration.

class to participate in the litigation of the issues on the merits nor that the absence of participation might, in some cases, produce an unfavorable result to the plaintiffs. But the alternative is a denial of *any* recovery in almost every other case since there will be virtually no class actions under Rule 23(b)(3) without some procedural innovation of the kind suggested here. We submit that the possible harm caused by non-participation by individual class members who do not learn of the action before liability is determined, is a small price to pay for giving members of the class at least the opportunity to recover their damages, an opportunity which will simply be unavailable if the decision of the Court of Appeals is upheld by this Court.

Under the proposal of *amici*, the members of the class would be bound by the outcome of the case and would be barred from further attempts to recover the money should the named plaintiff prove unsuccessful. Their recovery might also be less than the amount prayed for in the complaint, and they might have obtained a larger recovery if they had been able to participate. But, if we do as the Manual for Complex Litigation suggests,[15] and make a "realistic evaluation of the 'other available methods,'" this proposal is by far the fairest to members of the plaintiff class since they are sacrificing only a possibility of increasing their recovery or achieving a victory rather than a loss, but are exchanging it for an opportunity to have their causes of action litigated on the merits.

The due process cases in this Court cited by the Court of Appeals and the Advisory Committee[16] all involve

[15] 1 Pt. 2 Moore's Federal Practice, Pt. 1.43, p. 37.

[16] See 479 F.2d at 1017, n. 21 and 39 F.R.D. at 107.

situations which are distinguishable from this case. In those cases [17] the person who was found to have given the defective notice had an interest in conflict with the person who did not receive the notice. In this case, however, the absent class members are aligned with the person giving the notice (the named plaintiff), an alignment which is independently verified by the District Court in its determinations that plaintiff's claims are typical and that he adequately represents the members of the class. See Rules 23(a)(3) and 23(a)(4). [18] Accordingly, the "protection" which notice provides is far less of a necessity than in other actions. More importantly, in practical terms, if full notice is required, there will be no case at all, and the absent members of the class will be left without a remedy. Thus, the situations involved in the due process cases relied upon by the Court of Appeals and the Advisory Committee are so different from this case as to make those decisions inapposite.

Moreover, if due process precludes an adjudication involving members of the class without individual notice to them, the same due process objections would also apply to many actions brought under Rules 23(b)(1) and 23(b)(2), and yet notice is not required in those cases. See *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940) and Rule 23(c)(2). For example,

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[17] *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); and *Hansberry v. Lee*, 311 U.S. 32 (1940).

[18] Since it is in the interests of the defendant to demonstrate absence of typicality and inadequate representation, and thereby to deny plaintiff the right to maintain the case as a class action, there is adequate assurance that the proceeding will be adversary and that the District Court will not have to operate in the dark in deciding these questions.

an action to compel the payment of a dividend brought under subdivision (b)(1) affects every shareholder, and yet there is no requirement of individual notice to each of them. Similarly, what purport to be injunctive actions under Rule 23(b)(2) will often have significant monetary aspects to them, such as an action to enjoin a state official from underpaying a class of welfare recipients in violation of federal standards. If individual notice had to be given by the named plaintiffs to every member of those classes, there would be no actions of those kind, and yet there is no distinction between those cases and this one for purposes of due process. Finally, even the settlement procedures approved by the Second Circuit in *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1082-83, 1090-91, *cert. denied sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971), would also have unconstitutionally deprived members of the class of individual consumers of the monies to which they were entitled because individual notice was not provided to them.

In short, there are no real due process problems with respect to the members of the plaintiff class. While it would be "preferable" to give each class member personal notice before litigating the case on the merits, reasons of practicality eliminate that as a realistic consideration. The result is that either no notice is given, but there remains a possibility of recovering damages, or if that is held unconstitutional, the elimination of any possibility of recovery at all.[19] We see no reasonable basis for eliminating

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[19] As this Court noted in *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962), there are "practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every

(continued)

that possibility, and the proposal set forth above clearly allows for it.

Insofar as the defendants are concerned, there are no due process problems of fairness to them that would apply under the procedures that we have outlined. If every member of the class is bound, the defendants will have all of the protection to which they are entitled from the judgment; and they will have that protection without having to pay for the cost of notice to every member of the plaintiff class. But even if due process were to preclude the defendants from utilizing the judgment against other members of the plaintiff class, they run no real risk of having to litigate the case again. First, there would be the *stare decisis* effect of the prior determination on the merits which in some cases would include an authoritative ruling by this Court. Second, statute of limitations problems might prevent other plaintiffs from seeking to relitigate the issues. Third, and perhaps most important of all in a practical sense, is the unlikelihood that, because of inertia and a prior defeat, another plaintiff would make another try.

Evidence of the absence of any real need by most defendants to obtain the *res judicata* effect of a decision on the merits as a practical matter is contained in the pattern followed by the defendant in *Partain v. First Nat'l Bank of Montgomery*, 336 F. Supp. 65 (M.D. Ala. 1971). Without answering the complaint or permitting plaintiffs to move to certify the class, the defendant moved for summary judgment, and the motion was granted, without prejudice to the unnamed members of the class. The fact that the judgment,

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[19] (continued) situation." See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950): due process requires "notice and opportunity for hearing appropriate to the nature of the case."

which was reversed on appeal,[20] would have been good only against the three named plaintiffs, did not deter the defendant from making its motion for the obvious reason that there was no realistic possibility that anyone else would bring another identical action.[21] Finally, if a defendant wanted to insure that every member of the class was bound, it could always pay the costs of personal notice to the absent members, in which case the *res judicata* effect of the prior determination would be conclusive.

III. CONSUMER CLASS ACTIONS PERFORM AN ESSENTIAL FUNCTION IN OUR LEGAL SYSTEM

This Court's ultimate judgment with respect to the notice requirements of Rule 23 and the due process clause, as well as such other critical issues as manageability and fluid recovery, will determine the future viability and scope of the class action damage suit. We submit that consumer class actions perform a vital function in the American legal system, a function whose importance will increase as mass marketing techniques and economic concentration continue to increase.

The decision below is predicated on the assumption that the sole objective of civil damage litigation is "to afford compensation to the injured consumer." 479 F.2d at 1019. The Court of Appeals refuses to acknowledge that a major function of civil litigation is to prevent the occurrence

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[20] *Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 127 (5th Cir. 1972).

[21] This is the procedure followed by the defendants in *Ditlow v. Pan Am, supra*, now pending before the Court of Appeals for the District of Columbia Circuit.

of such injuries, through a system in which compensation, in the form of damage judgments (whether or not fully distributed to the actual victims of those who violate the law), is also the vehicle of deterrence. *See generally* B. Moore, *The Potential Function of the Modern Class Suit*, 2 Class Action Rep. 47 (1973). Compensation of aggrieved individuals is unquestionably an important and desirable objective in its own right, *id.* at 48 n. 7., but compensation alone can achieve little more than pacification of those few individuals sufficiently outraged by their injuries to embark upon the treadmill of litigation. A legal system premised exclusively upon compensation cannot deter violations of law by which citizens – corporate and individual – must order their conduct.[22]

The nature of the modern economy is increasingly such that the individual's quest for compensation, whether through his own personal lawsuit or as a member of a class, cannot be relied upon to deter violations of the law. This is particularly true of the relationship between consumers and the businesses with which they deal. Under our economic system, violations of the antitrust and other consumer protection laws often produce injuries that are

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22 The Court of Appeals equated multi-million dollar class damage settlements with "legalized blackmail," terming such sums "astronomical." 479 F.2d at 1019. We suggest, however, that the proper equation is between the "astronomical" wrongdoing of the defendants and a recovery by their victims of no more than the defendants' ill-begotten gains. Even where the class recovery includes a penalty, as in the Clayton Act's treble damage provision, Congress is presumed to have determined that optimum deterrence requires recovery of actual damages plus the penalty in order, for example, to compensate for inherent deficiencies in the litigation process. Moore, *supra*, at 48-49.

immense in the aggregate, but are meted out to individual consumers in amounts so small as to preclude individual redress through litigation.[23] It is precisely the ability of these mass produced, invisible torts to escape the remedial deterrence of the civil litigation process that has enabled them to survive, while many far less costly, but more blatant forms of business misconduct of earlier periods have declined. To accomplish the goal of deterrence through the civil courts, without resort to the viable form of class proceeding rejected by the Court below, would require the active participation of individual consumers in hundreds of small lawsuits in their own names. To impose such a burdensome alternative to an effective class damage suit upon them and upon our judicial system would be neither feasible nor desirable.

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[23] It may be argued that cases such as this, even when handled as class actions, do not provide sufficient compensation to warrant the costs of litigation and distribution. The Court of Appeals estimated that the average member of the class would have sustained damages of $1.30 which when trebled would total $3.90, and suggested that because the cost of distribution "might run into the millions of dollars . . . the class action was hopelessly unmanageable." 479 F.2d at 1010. That position incorrectly assumes that under the Clayton Act it is the plaintiffs who must absorb those costs, and also neglects to take into account the deterrent effect of that judgment on other would-be violators in assessing the benefits derived from it. Moreover, in *Ditlow v. Pan Am*, *supra*, if recovery is allowed under plaintiff's antitrust claim, each person will receive approximately $120, and hence the economic justification for distribution to individual claimants is undisputed, as it undoubtedly will be in many cases where the individual damages, although too small to permit non-class litigation, far exceed the estimated recovery per person in this case.

This Court should approach the issues raised in this case in this light: that a damage recovery in behalf of a consumer class is in a broader sense a recovery on behalf of all consumers and that all consumers may rely on the courts to facilitate legitimate class recoveries by others, to deter injuries to themselves.

CONCLUSION

As we have demonstrated above, there is a rational, fair alternative, consistent with notions of due process and Rule 23, which enables this case to go forward as a class action under Rule 23(b)(3) without unduly burdening either the plaintiffs or the defendants. Accordingly, the decision of the Court of Appeals should be reversed, and the matter remanded for further proceedings in accordance with that alternative.

Respectfully submitted,

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November 29, 1973

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, individually and on behalf of all persons using transpacific air transportation since May 1, 1973, *Plaintiffs,*	)	
v.	)	CIVIL ACTION NO. 999-73
PAN AMERICAN WORLD AIRWAYS INC., *et al.,* *Defendants.*	)	CLASS ACTION

COMPLAINT FOR MONETARY DAMAGES

1. This is an action brought individually and on behalf of a class of all persons who, on or since May 1, 1973, have flown between points in the United States and points in Asia/Australia/Australasia and islands in the Pacific (the "transpacific market") on any of defendant airlines. Plaintiff on behalf of himself and the class seeks damages for the unlawful charging by defendants of fares not contained in currently effective tariffs and for the charging of fares unlawfully agreed to by defendants in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

2. This Court has jurisdiction pursuant to 15 U.S.C. §15 and 28 U.S.C. §1337.

3. Between May 15, 1973, and May 20, 1973, plaintiff Clarence M. Ditlow made a round-trip journey from Washington, D.C., to Tokyo, Japan, on defendant Northwest Airlines, Inc. ("Northwest"). The portion of that journey

in the transpacific market was from Anchorage, Alaska, to Tokyo and from Tokyo to Seattle, Washington (the "West Coast-Tokyo journey"), for which plaintiff Ditlow was charged $875.80.

4. The defendants are airlines authorized by the Civil Aeronautics Board ("C.A.B.") to engage, *inter alia*, in the transportation of passengers in the transpacific market.

FIRST COUNT

5. During March 1973 defendants met in London, England, and agreed on fares for travel in the transpacific market to become effective on May 1, 1973 (the "London Agreement"). These fares included a 5% increase in the then effective transpacific fares, which was purported to reflect the devaluation of the dollar which occurred in February, 1973.

6. On and since May 1, 1973, defendants have implemented the London Agreement and have been demanding, collecting and receiving fares which reflect said 5% increase.

7. The London Agreement has had a substantial effect on foreign commerce in the transpacific market.

8. The London Agreement constitutes an unlawful contract, combination, and conspiracy in restraint of commerce with foreign nations and is a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

9. Because the C.A.B. has not approved the London Agreement pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, defendants are not entitled to the relief granted by Section 414 of the Federal Aviation Act, 49 U.S.C. §1384, from the operation of the antitrust laws.

10. As a result of the said unlawful London Agreement, plaintiff Ditlow was charged $875.80 for the West Coast-Tokyo journey by defendant Northwest, whereas in the absence of said unlawful agreement, he would have been charged no more than $834.00.

11. Pursuant to 15 U.S.C. §15, plaintiff Ditlow is entitled to recover from defendant Northwest and the other defendants three-fold his damages of $41.80, for a total of $125.40, plus the costs of this action, including a reasonable attorney's fee.

SECOND COUNT

12. Repeats each and every allegation of paragraphs 5-9, inclusive.

13. As a result of the unlawful London Agreement, defendants have been charging and collecting from all passengers flying in the transpacific market fares which are 5% greater than the fares which defendants would have charged in the absence of that agreement.

14. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines and who have been charged fares pursuant to the London Agreement.

15. The members of the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will

fairly and adequately protect the interests of the class; and a class action is superior to other available methods for fair and efficient adjudication of the controversy between members of the class and defendants.

16. As a result of the unlawful London Agreement, each member of the class has been damaged in an amount equal to approximately 5% of the fare which he was charged for his transpacific flight, with the total amount of damages to the class being approximately $1,700,000.

17. Defendants are jointly and severally liable for the damages each member of the class has sustained.

18. Pursuant to 15 U.S.C. §15, each member of the class is entitled to recover from the defendants threefold his damages, for a total estimated recovery of $5,100,000, plus the costs of this action, including a reasonable attorney's fee.

THIRD COUNT

19. Section 403(b) of the Federal Aviation Act, 49 U.S.C. §1373(b), provides in relevant part: "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs . . ."

20. As of May 1, 1973, defendants, who are either air carriers or foreign air carriers within the meaning of 49 U.S.C. §1373(b), have had no currently effective tariffs for travel in the transpacific market.

21. The last non-interim tariff which defendants filed with the C.A.B. for transpacific flights expired on March 31, 1973.

22. For the period from April 1, 1973, to April 30, 1973, inclusive, defendants had on file with the C.A.B. tariffs which were 5% greater than the tariffs described in paragraph 21.

23. For his round-trip West Coast-Tokyo journey, plaintiff Ditlow was charged by, and paid to, defendant Northwest $875.80, which is the amount of the tariff which was effective only for the month of April and which is $41.80 greater than the tariff in effect prior to said temporary April tariff.

24. Said fare of $875.80 was unlawfully charged and collected by defendant Northwest because such fare was not contained in a tariff effective at the time it was charged and collected.

25. As a result of Northwest's charging an amount in excess of that reflected in a currently effective tariff, Northwest was in violation of Section 403(b), and plaintiff Ditlow is entitled to recover $41.80 from defendant Northwest.

FOURTH COUNT

26. Repeats each and every allegation of paragraphs 19-22, inclusive.

27. Commencing on May 1, 1973, all of the defendants have been charging passengers in the transpacific market 5% more for fares than they charged in the tariff referred to in paragraph 21.

28. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines

and who have been charged an amount greater than that reflected in the tariff referred to in paragraph 21.

29. The members of the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of the plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for fair and efficient adjudication of the controversy between members of the class and defendants.

30. As a result of defendants' unlawfully charging fares in violation of Section 403(b), each member of the class is entitled to recover from the defendant airline on which he or she flew an amount equal to the 5% difference between the fare charged and paid and the last non-temporary trans-pacific tariff which defendants had filed with the C.A.B., with the total amount of damages to the class being approximately $1,700,000.

WHEREFORE, plaintiffs pray for:

1. a judgment for plaintiff Ditlow on count one in the amount of $125.40, plus costs of this action and a reasonable attorney's fee; or if that relief is denied, a judgment in the amount of $41.80 on count three;

2. a judgment on count two against the defendants jointly and severally in favor of each member of the plaintiff class for threefold the damages each member of the class sustained as a result of the defendants' unlawful London Agreement, for a total of approximately $5,100,000, plus costs of bringing this action and a reasonable attorney's fee; or if that relief is denied, a judgment in favor

of each member of the plaintiff class on count four against the defendant airline on which he or she flew in the trans-pacific market for the amount by which what said member paid exceeds the amount of the fare effective in the tariff which expired on March 31, 1973, for a total of approximately $1,700,000;

3. an order granting plaintiffs such other and further relief as may be just and proper; and

4. an order awarding plaintiffs their costs and disbursements in this action.

Dated: Washington, D.C.
May 22, 1973

/s/ Alan B. Morrison
Alan B. Morrison

/s/ Raymond T. Bonner
Raymond T. Bonner

Attorneys for Plaintiffs

SUPREME COURT, U. S.

FILED

NOV 30 1973

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Appellant,

against

CARLISLE & JACQUELIN, *et al.*,

Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

Interest of the *Amicus*

New York State is concerned with the instant action because it bears upon the ability of large numbers of individuals to redress injuries which they have suffered as a group. Providing remedies to consumers victimized in the marketplace, ending unlawful discriminatory practices that violate the civil rights of particular classes of persons and protecting the interest of the public in an unpolluted environment are policies and goals that New York State forcefully advocates. But governmental interest alone cannot relieve

such group injuries, for federal and state budgets and manpower are limited. Private legal class actions, therefore, are necessary to provide effective relief to large classes of citizens who suffer a common injury.

As one of the most populous states in the country, with diverse metropolitan areas and innumerable businesses and industries, New York State is especially aware that many large groups of individuals are exposed to similar types of injuries which cannot be remedied practicably through individual legal action. Collective damages in such instances may amount to substantial sums, but individual claims are often so small that the cost of litigation precludes their pursuit. Moreover, legal redress which is secured on an individual basis enables wrongdoers to retain most of the fruits of their illegal activity and is at best a haphazard and an uncertain deterrent to similar conduct in the future.

Class actions overcome these difficulties by allowing one member of the injured group to sue in the name of all others similarly situated. Class suits thereby serve a quasi-public function; they offer obvious economic and procedural advantages over a multiplicity of single lawsuits and exert a far stronger prophylactic influence upon defendants. Furthermore, they offer both the representative and the class the incentive of recovering their damages if they prevail. In particular, since the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure did away with the awkward categorization of class actions into "true," "hybrid" and "spurious"* the Federal District Courts have generally provided more receptive, uniform forums for large class actions than have state courts.

New York State, therefore, considers the outcome of the instant case to be of particular importance. The opinion

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* Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), 39 F.R.D. 69, 98.

of the Second Circuit Court of Appeals, if sustained by this Court, will restrict the discretion exercised by Federal District Courts in determining the manageability of class actions brought under Rule 23. It will also preclude a flexible approach to the problems of notice to the class (including the type of notice and the allocation of its cost) and form of recovery which are peculiar to each case. This view is not only contrary to the liberal spirit of the 1966 amendments to Federal Rule 23, but is also contrary to the latest recommendations contained in the federal Manual For Complex Litigation, § 1.45 (Notices In Class Actions), and will severely limit the use of federal class actions by those large, multifarious classes whose damages are the most extensive of all.

The State of New York, by its Attorney General, Louis J. Lefkowitz, accordingly files this brief as *amicus curiae* in support of reversal pursuant to Rule 42 of the Rules of this Court.

Questions Presented

1. Are the requirements of due process and Rule 23 (c)(2) of the Federal Rules of Civil Procedure satisfied, in a class action where the class consists of six million members of whom two million are reasonably identifiable, by directing individual notice to the two thousand class members with sufficient stake in the proceedings to justify personal intervention and to five thousand other class members selected at random, in addition to published notice?

2. Does the Federal District Court have discretion to allocate to the defendants ninety percent of the cost of notice to the class where the individual plaintiff cannot afford to pay for such notice and has demonstrated in a preliminary evidentiary hearing the probability of his success on the merits?

3. May the application of a "fluid class recovery" theory be considered by the District Court in order to benefit the class as a whole once individual members' claims have been satisfied?

Statement of the Case

This is an appeal from a decision of the United States Court of Appeals, Second Circuit, decided May 1, 1973, which dismissed this case as a class action, reversing the United States District Court for the Southern District of New York, which had held that this case was maintainable as a class action and that the cost of notifying the class should be allocated between the parties.

The appellant herein was a trader in "odd-lots" (lots of less than one hundred shares) of securities on the New York Stock Exchange. Alleging that two brokerage firms, appellees Carlisle & Jacquelin and DeCoppett & Doremus, had combined to monopolize odd-lot trading and, assisted by the failure of appellee New York Stock Exchange to adopt rules protecting investors in odd-lots, had set an excessive charge for handling odd-lots (the "odd-lot differential"), Eisen brought a class action in the name of all purchasers and sellers of odd-lots on the New York Stock Exchange between May 1, 1962 and June 30, 1966. This class included approximately six million such investors. The average odd-lot trader engaged in five transactions during this period. Each transaction averaged 28.2 shares, at a cost of $50.84 per share, and the average odd-lot differential was $5.18.

The District Court initially dismissed the case as a class action without prejudice to Eisen's litigating his individual claim. *Eisen* v. *Carlisle & Jacquelin,* 41 F.R.D. 147 (S.D.N.Y. 1966). Eisen appealed this order to the Second Circuit Court of Appeals, and defendants moved to dismiss

the appeal on the ground that the District Court's ruling was a nonfinal order. The Second Circuit held, in what has come to be known as *"Eisen I"*, that the interlocutory order dismissing the case as a class action was appealable because, in light of the small individual claims and the disproportionate cost their litigation would involve, it sounded the "death knell" of the lawsuit. *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), *cert. den.* 386 U.S. 1035 (1967).

Subsequently, in *"Eisen II"*, the Second Circuit held that the District Court's dismissal of the matter as a class action had been based upon an insufficient analysis of the standards contained in Rule 23 of the Federal Rules of Civil Procedure. The case was remanded to the District Court for evidentiary hearings on the issues of notice, representation, administration and other appropriate matters, the Second Circuit expressly retaining jurisdiction. *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968).

On remand, the District Court found that the issues of manageability and notice were essential to a determination of whether a class suit could proceed. *Eisen* v. *Carlisle & Jacquelin*, 50 F.R.D. 471 (S.D.N.Y. 1970). The District Court then held that the case was in fact manageable as a class action and that individual notice to the two million identifiable class members was unnecessary. *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971). After a preliminary hearing on the merits, the District Court also allocated ninety percent of the cost of notice to defendants. *Eisen* v. *Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972).

On May 1, 1973, in *"Eisen III"*, the Second Circuit Court of Appeals, holding that defendants could appeal the order granting leave to proceed as a class action, reversed the District Court and ruled that individual notice must be sent, at Eisen's sole expense, to all identifiable class members; that the District Court's contemplated use of a fluid class recovery theory to apply any damages unclaimed by individual

class members to the benefit of the class as a whole was improper; and that the action was unmanageable as a class action. On May 24, 1973, the Second Circuit denied Eisen's petition for a rehearing *en banc*. *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973).

POINT I

Requiring plaintiff to provide and pay for individual notice to two million identifiable class members is contrary to a liberal interpretation of Federal Rule 23 and is not dictated by the standards of due process.

A. Rule 23 allows courts great flexibility in adminstering class actions.

Federal Rule 23 was amended in 1966 in order to describe "in more practical terms the occasions for maintaining class actions." Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), *supra*, 39 F.R.D. at p. 99. The original Rule 23 had defined class actions in such abstract categories as to obscure the instances in which they could appropriately be brought. The interpretation of amended Rule 23 enunciated by the Second Circuit Court of Appeals in the *Eisen* case has revived this problem by taking a restrictive view of class actions brought under Rule 23(b)(3), where the class is characterized by common questions of law or fact.

Historically, equitable considerations have played an important role in dealing with large, diverse classes similar to the class represented by Eisen. "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940). Pro-

fessor Moore notes:

> "Class suits evolved in English equity through necessity. In order to do complete justice compulsory joinder of all interested persons became the general, accepted rule in chancery. But this rule, relentlessly applied, would preclude decision of cases where it was impracticable or impossible to get all the interested persons before the court. The class action was both an escape from and an adjustment to the rule of joinder. Its utility and the impracticability of any other type of procedure gave impetus to its development." 3B *Moore's Federal Practice,* at p. 23-72.

Class suits became recognized for similar reasons by state and federal courts in the United States as well. Rule 38 of the Equity Rules of 1912 set forth the established federal practice as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

As class actions developed, the need for finality and for avoiding repetitious litigation by individual class members became apparent. "If the decree [in class actions] is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree." *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 363 (1921). Unfortunately, the problem was complicated by the enactment in 1937 of original Rule 23 of the Federal Rules of Civil Procedure, which characterized class rights as:

> "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The first two categories above were the so-called "true" and "hybrid" class actions, respectively, and represented an attempt to restate and clarify Equity Rule 38 in light of its construction by federal courts. However, the third category, the "spurious" class action, was an expansion of the existing rule and a departure from past practice because it incorporated a *permissive* joinder device, "common question of law or fact." Original Rule 23 was interpreted liberally. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 88 (7th Cir. 1941). Nevertheless, courts had difficulty in applying these terms to actual classes and in defining the extent of judgments in class actions. Only the parties were bound in "spurious" class actions, creating an anomalous sort of "class", indeed, whose members, if not joined, could proceed individually even after a decision on the merits affecting the class had been rendered. Actions were classified inconsistently, and often the result which seemed appropriate in terms of its *res judicata* effect, rather than the provisions of original Rule 23, governed the designation of classes. See Proposed Rules of Civil Procedure (Advisory Committee's Note to Amend Rule 23), *supra,* 39 F.R.D. at pp. 98-99; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harv. L. Rev. 356 (1967) at p. 385.

Despite these difficulties, the class action frequently was resorted to by groups of individuals, with small personal claims, linked together by a common legal or factual basis. Professors Kalven and Rosenfeld observed in *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684

(1941) at p. 686 that "[m]odern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress . . ." Such groups, they note at p. 684, may include:

> "[t]he employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the rate-payer who has been charged an excessive rate, the depositor in a closed bank, the taxpayer who resists an illegal assessment, or the small businessman who has been the victim of a monopoly in restraint of trade . . ."

Amended Rule 23 sought to eliminate the confusing distinctions which had created such uncertainty in the use of class actions. Thus, although amended Rule 23(b)(3), under which the *Eisen* case is maintained, refers to "questions of law or fact common to the members of the class," it does not correspond to the former "spurious" class action. The mere existence of common questions of law or fact does not suffice to constitute a class.

In the instant case, for example, the class members are commonly aggrieved by having been charged an arbitrary and excessive odd-lot differential by appellees during the period 1962-1966. Rule 23(b) (3) provides that the court must determine (a) whether or not this common issue predominates over any interest that individual members have in separately pursuing the questions which affect them and (b) whether or not a class action is superior to other available methods of proceeding. It then states:

> "The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the par-

> ticular forum; (D) the difficulties likely to be encountered in the management of a class action."

Here, the Second Circuit Court of Appeals has concentrated on the issue of manageability to the exclusion of practically all other matters. But "difficulties in management are of significance only if they make the class action a *less* 'fair and efficient' method of adjudication than other available techniques." *In Re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 282 (S.D.N.Y. 1971) (emphasis original).

Furthermore, as the First Circuit Court of Appeals said in *Yaffe* v. *Powers,* 454 F. 2d 1362 (1st Cir. 1972), a case where the class was amorphously defined in terms of all individuals who wished to engage in peaceful political discussion in the city of Fall River, Massachusetts, without police harassment (at p. 1365):

> ". . . for a court to refuse to certify a class . . . because of vaguely-perceived management problems is counter to the policy which originally led to the rule, *and more especially, to its thoughtful revision,* and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise . . ."

(and again at p. 1367):

> *"The genius of Rule 23 is that the trial judge is invested with both obligations and a wide spectrum of means to meet those obligations . . . [T]he burden of administering this kind of a class suit should not be pessimistically estimated."* (Emphasis supplied.)

In addition, Rule 23(d) empowers the court, "in the conduct of actions to which [Rule 23] applies," to "make appropriate orders . . . dealing with . . . procedural matters."

It is clear that in treating the management problems posed by the questions of notice and by the administration of plain-

tiff's possible recovery, the Second Circuit has ignored the equitable design of Rule 23 and the concomitant flexibility and power which courts have thereunder. Its reluctance to permit the exercise of such discretion, as Judge Tyler undertook to do earlier in this case (*Eisen* v. *Carlisle & Jacquelin, supra,* 52 F.R.D. 253), precludes any effective application of Rule 23 to the particular circumstances of each case as it arises.

B. Neither Rule 23 nor due process requires that individual notice be given to the members of the class.

The equitable concern which Rule 23(b)(3) shows for the individual interests of class members appears again in the provisions of Rule 23(c)(2):

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

The opportunity given a class member to opt out of the proceedings or to be bound by them has little practical bearing on this case because the damages sustained by the average class member are so small as to make it extremely unlikely that he would pursue his claim. This very fact led the Second Circuit in *"Eisen II" (Eisen* v. *Carlisle & Jacquelin, supra,* 391 F. 2d 555) to remand the case to Judge Tyler for an evidentiary hearing on notice and other matters, well aware that a summary denial of leave to proceed as a class would sound the "death knell" of the action because of the disproportionate cost of individual lawsuits.

Nevertheless, the fact that no other class member has indicated a willingness to participate in *Eisen* does not detract from the action. As Judge Weinstein has noted in *Revision of Procedure: Some Problems in Class Actions,* 9 Buff. L. Rev. 433 (1960):

> "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights . . . The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." 9 Buff. L. Rev. at p. 460.

See also *Korn* v. *Franchard Corp.,* 456 F. 2d 1206 (2d Cir. 1972).

In this context, what constitutes "the best notice practicable under the circumstances" is a determination that is well within the discretion of the court. Accordingly, when Judge Tyler devised his notice plan for *Eisen,* he took into consideration the facts which are peculiar to this case and shaped "the best notice practicable" to fit them. Only one-third of *Eisen's* six million-member class can be identified through reasonable effort, and of these, only some two thousand have engaged in ten or more odd-lot transactions during the period in question. Judge Tyler directed individual notice to these two thousand persons, whose financial interest in relation to that of the rest of the class seemed strong enough to warrant their possible intervention, together with individual notice to five thousand other class members to be selected at random and published notice to appear in the Wall Street Journal and in financial sections of newspapers in New York, San Francisco and Los Angeles, where the greatest numbers of class members were located.

In short, the District Court in *Eisen* merely held that individual notice to all reasonably identifiable class members is not "the best notice practicable under the circumstances." A similar procedure was followed in *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1079 (2d Cir.), *cert. den. sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971), which involved sixty-six consolidated class actions brought under Rule 23(b)(3). Three classes of purchasers of antibiotic drugs were involved: governmental and institutional purchasers; consumers; and wholesalers and retailers. Notice to the enormous, diverse consumer class was directed by publication. In affirming the result the Second Circuit Court of Appeals noted:

> "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action, notice by publication was obviously the only practical alternative." 440 F. 2d at p. 1090.

Some sort of notice to the class is mandatory under Rule 23(c)(2); individual notice is mandatory only if it is the best practicable. See Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), *supra*, 39 F.R.D. at pp. 106-107; Manual For Complex Litigation, § 1.45 (Notices In Class Actions). This view of notice is consistent not only with amended Rule 23, but with the standards of due process as well. The court in *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), stated:

> "Although traditional due process standards require that the notice be one reasonably calculated to apprise members of the class of their opportunity to object or to 'opt out' rather than be bound by the determination of the class action, . . . we would be naive not to recognize that where (as here) the maximum amount re-

coverable on behalf of each of thousands of stockholders would be quite small, those receiving notice would in all probability not have enough incentive to take any action . . . To overemphasize the notice requirement would be to stymie the purpose of the class action device . . ." 48 F.R.D. at p. 129.

A pragmatic approach to notice in a particular proceeding is not precluded by the "traditional due process standards" referred to above. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Once the court is convinced that there is substantial merit to plaintiff's claims and that the class action device is the practicable method of vindicating these claims, it will not let procedural difficulties stand in its way." *Dolgow* v. *Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968). In light of what the individual interests in *Eisen* are actually like, the notice ordered by Judge Tyler certainly constituted "notice reasonably calculated, *under all the circumstances*, to apprise all interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co., supra*, 339 U.S. at p. 314 (emphasis supplied). *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), reiterated rather than altered the case-by-case approach of *Mullane* and in fact reemphasized its flexibility by holding that individual notice must be given to a single, "very easily ascertainable" person with a substantial direct interest in the particular proceedings. The nature of the legally protected rights and of the class involved in *Eisen*, "under all the circumstances" and particularly since the adequacy of appellant's representation is unquestioned in these proceedings, does not require such individual notice to satisfy due process. *Hansberry* v. *Lee, supra*, 311 U.S. at pp. 42-44.

C. Rule 23 does not require the plaintiff in a class action to bear the cost of notice.

When the Second Circuit remanded this case to the District Court in 1968, it directed the holding of an evidentiary hearing "on the questions of notice, adequate representation, effective administration of the action, *and any other matters which the District Court may consider pertinent and proper. Eisen* v. *Carlisle & Jacquelin, supra,* 391 F. 2d at p. 570 (emphasis supplied). Exercising this discretion, granted him also under Rule 23(c)(2), which says that notice shall be as "the Court shall direct", Judge Tyler held a preliminary evidentiary hearing on the merits in order to determine how the cost of notice should be allocated between the parties. As a result of this "mini-hearing" the court concluded that Eisen had demonstrated the probability of his success on the merits and allocated ninety percent of the cost of notice to defendants.

It has always been clear that Eisen cannot sustain the entire cost of notice; if he were arbitrarily assigned this burden, which nothing in Rule 23 requires him to assume, this class action could proceed no further. The class suit's roots in equity and the spirit of amended Rule 23, however, preclude courts from simply closing their doors to litigants because of such "novel and difficult questions." *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at p. 289. Moreover, the public interest served by class actions demands that courts exercise the full range of administrative options provided them by Rule 23.

In the instant case, the District Court considered the merits of Eisen's claim, not in order to determine the propriety of proceeding as a class (it was apparent from the outset that a class action was the only feasible way to proceed), but in order to decide who should pay for notice to that class. *Cf. Miller* v. *Mackey International, Inc.,* 452 F. 2d 424 (5th Cir. 1971). Not only is such a resourceful application of the court's administrative powers within the contemplation of

Rule 23, it has been suggested and made before. *Dolgow* v. *Anderson, supra,* 43 F.R.D. at pp. 498-501, and *Ostapowicz* v. *Johnson Bronze Co.,* 54 F.R.D. 465 (W.D. Pa. 1972). See also *Berland* v. *Mack, supra,* 48 F.R.D. at pp. 131-132.

POINT II

The application of a "fluid class recovery" theory may be considered by the court in administering any relief that is awarded the plaintiff in this class action.

The *Eisen* case was brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, which grants plaintiffs thereunder direct jurisdiction in the Federal District Courts, obviating the usual ten thousand dollar jurisdictional prerequisite. As discussed above, amended Rule 23 is designed to enable groups of individuals whose personal damages are small enough to preclude their undertaking private legal action to redress their grievances, nonetheless, as a class. Particularly in areas like securities, antitrust, consumer protection and civil rights, where the injuries to private citizens are the everyday concern of government, class actions serve an important public need that understaffed and inadequately budgeted governmental agencies cannot fulfill alone. It is obvious that the most far-reaching wrongs committed in these areas will create, as in *Eisen,* the most extensive and varied classes.

Class actions compel defendants who conduct their activities "to the detriment of millions of individual[s]" to disgorge "their ill-gotten gains which, once lodged in the corporate coffers, are [otherwise] said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small." *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at pp. 282-283. But in *Eisen,* as in many large class actions, a large proportion of the class membership cannot be identified. Once adjudged damages have been applied to satisfy individual claims, therefore, a substantial fund will remain for the court to administer.

Contrary to the view of the Second Circuit, this does not pose so insuperable a problem as to make *Eisen* unmanageable. The flexibility and discretion which Rule 23 gives the courts extends as well to consideration of forms of recovery that are appropriate to the facts of each case. Where legal rights protected by federal statutes are violated, courts have a duty to provide remedies to effectuate the Congressional purpose. *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). As Professor Miller stated in *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3),* 54 F.R.D. 501:

> "Courts should not be reluctant to adopt procedures . . . that seem to fit a particular case. These steps are not radical deviations but have a strong relationship to the wide range of approaches utilized by the courts in the analogous process of framing equity decrees." 54 F.R.D. at pp. 510-511.

Thus, the application of a "fluid class recovery" theory to the *Eisen* case is certainly within the discretion of the court. That portion of any recovery which remained undistributed after individual claims were paid would be used to benefit the class as a whole, perhaps by reducing the differential to be charged in future odd-lot transactions or by being applied to a related public purpose by the government. *Bebchick* v. *Public Utilities Commission,* 318 F. 2d 187 (D.C. Cir.), *cert. den.* 373 U.S. 913 (1963), although not a class action, used a fluid recovery theory in order to apply the fund represented by a retroactively abrogated transit fare increase to the future benefit of the class of mass transit riders who had paid it in the interim. See also *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 314 F. Supp. 710, the judicially approved settlement of which incorporated a fluid class recovery without creating ungovernable management problems. *Snyder* v. *Harris,* 394 U.S. 332 (1969), cited by the Second Circuit as authority precluding a fluid class recovery theory, is entirely in-

apposite to *Eisen*. Federal jurisdiction was not directly granted by statute in *Snyder*, but was sought on the basis of diversity of citizenship. The claim of the individual plaintiff still had to amount to ten thousand dollars, and this Court held that it could not be aggregated with the claims of the rest of the class in order to reach that figure.

Class actions help to make laws which protect the public interest more nearly self-enforcing by enabling private individuals jointly to pursue their common claims. If courts fail to devise a remedy when such wrongs occur, then the wrongdoer will be able to retain illegal profits and avoid intended sanctions with impunity. Any difficulty in administering a recovery is certainly not the fault of the injured class. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit denying this case leave to proceed as a class action should be reversed.

Dated: New York, New York, November 28, 1973

Respectfully submitted,

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Supreme Court of the United States

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SUPREME COURT, U. S.

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated, *Petitioner*

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an Unincorporated Association, *Respondents*

BRIEF OF AMICUS CURIAE, THE COMMONWEALTH OF PENNSYLVANIA, IN SUPPORT OF PETITIONER

Certiorari To The United States Court of Appeals For The Second Circuit

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents

Certiorari To The United States Court of Appeals For The Second Circuit.

The Commonwealth of Pennsylvania files this brief as *Amicus Curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

INTERESTS OF THE AMICUS CURIAE

The issues before this Court in the case *sub judice* are of great significance and importance to the *Amicus Curiae*, the Commonwealth of Pennsylvania, in the protection of its rights, the rights of its citizens and those of the political subdivisions within Pennsylvania's borders.[1] The meaningful application of the class action procedure pursuant to Rule 23, Federal Rules of Civil Procedure, has enabled *Amicus Curiae* in many cases to recover for its own treasury, the treasuries of its political subdivisions, and, in some instances, for its citizens,[2] overcharges resulting from antitrust violations. In so doing, the Commonwealth has been an effective enforcer of the antitrust laws.[3] In this area, Rule 23 has enabled the Commonwealth to act where it otherwise might not and more particularly, enabled the Commonwealth to secure redress for its political subdivisions and citizens in instances when clearly the latter were powerless to protect themselves. Accordingly, the viability and effectiveness of Rule 23 is of great concern to the Commonwealth.

In addition to the recovery of overcharges, the class suit hopefully has had the prophylactic effect of deterring future violations of the antitrust laws by potential violators. Indeed, the threat of a judgment in favor of an entire class has a greater preventative value than a judgment against a single member of that class.

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1. States and municipalities "are inherently charged with the duty to protect wide-reaching public interests." *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962).

2. In the antibiotics litigation, *State of West Virginia v. Chas. Pfizer Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), the Commonwealth and other states and counties and cities were able to recover by way of settlement 50% of the purchases of tetracycline products for its citizens.

3. "When the State seeks damages for injuries to its commercial interests, it may sue under §4 (of the Clayton Act)." *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972).

As in the case of many of the sovereign states, the Commonwealth's Attorney General's Office has limited resources to allocate toward antitrust enforcement. Antitrust litigation, almost by definition, is complex, protracted and costly. The class action, pursuant to Rule 23, has allowed the Commonwealth, other states and their subdivisions to allocate their resources most effectively in enforcing these important laws. Indeed, the class action allows a state or its subdivisions to pursue its rights through class actions commenced on its behalf by others and likewise to protect the rights of other injured parties through class actions brought by it. Moreover, where a state is powerless to bring litigation on behalf of its injured citizens, e.g. *State of California v. Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir. 1973) Rule 23 enables the citizens to protect themselves, just as in the case *sub judice*.

While the District Court in the case *sub judice*, 52 F.R.D. 253 (S.D. N.Y. 1971) and 54 F.R.D. 565 (S.D. N.Y. 1972), gave life and vitality to Rule 23, the Court of Appeals for the Second Circuit, (App. 92a *et seq.*)[4] extinguished that life. The Court of Appeals ruling in *Eisen* threatens the effective private enforcement of the antitrust laws as it has developed since the *Electrical Equipment* cases.[5] The Second Circuit decision, if not the "death knell," clearly represents a crippling blow to the practical application of Rule 23 and its role in the effective enforcement of important federal laws, including, *inter alia*, the anti-trust and securities laws and other violations of law similarly injuring large classes of persons.

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4. Page references are to the pages of the Appendix which accompanied the Petition for a Writ of Certiorari.

5. i.e., *City of Philadelphia v. Westinghouse Electric Corporation*, Civ. No. 29810 and related cases (E.D. Pa. 1961); *City of Chicago v. Allen Bradley Company*, 32 F.R.D. 448 (N.D. Ill. 1963).

ARGUMENT

A. While the District Court decision enhanced the viability and effectiveness of Rule 23, the Court of Appeals decision emasculates Rule 23.

In *State of Hawaii v. Standard Oil Company of California*, 405 U.S 251, 266 (1972), this Court stated:

> ". . . Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed *Hawaii's* class action only because it was unwieldy, *it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens.*" [Emphasis added].

In *Eisen*, the District Court's decision, 52 F.R.D. 253 (S.D. N.Y. 1971), construed and applied Rule 23 so as to assure its use when its substantive requirements were met and sought to find solutions to the administrative and practical problems which sometimes arise in its application. In so doing, the District Court found practical solutions to the "best notice practicable under the circumstances", the "cost of notice", and the individual questions of damages versus "fluid class recovery." In bold contrast to the District Court's treatment of these problems, the Second Circuit crushed the District Court's thoughtful and pragmatic solutions to these inherent administrative issues. The consequence of the Second Circuit's decision, if left to stand, will be to limit severely the use of class actions and unlike this Court's observation in *Hawaii*, it will, for practical purposes, constitute a holding "that a State could never bring a class action on behalf of some or all of its consumer citizens."

The courts have generally subscribed to the view that in determining the "best notice practicable", where possi-

ble, the notice provisions of Rule 23 should not be so stringent as to defeat otherwise valid class actions. Indeed, the Second Circuit so held in an earlier *Eisen* decision. 391 F.2d 555 (2d Cir. 1968). Yet this latest *Eisen* decision prescribes a stringent monetary requirement on a class action plaintiff, which requirement most likely will limit the use of Rule 23 to those plaintiffs with a fund available to finance the class action notice.

B. Imposing the costs of notice on a plaintiff may prevent the prosecution of a proper class action; these costs may properly be placed upon defendants.

In most instances, class actions arise in complex and protracted cases involving alleged violations of the antitrust laws. These cases, even without the costs of a class action, are extremely expensive undertakings. More often than not, the expenses can exceed the claims of a single plaintiff. Accordingly, as this Court and other courts have recognized, the class action is an effective device for pursuing small claims which might otherwise remain unremedied. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972); *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 715 (7th Cir. 1968). The additional burden of costs of class notice upon a plaintiff or plaintiffs in any particular instance may surely constitute the final barrier repulsing a plaintiff from commencing a class action. This impediment may properly be removed by placing all or a portion of the initial costs of notice upon defendants.

Sometimes overlooked, and sometimes intentionally so by defendants, is the benefit derived by defendants from the invocation of Rule 23. If in fact the defendants are adjudged not to have violated the law as charged, the defendants receive the protective umbrella of *res judicata* as to all members of the class who received notice and did not elect to exclude themselves from the class action. Rule 23(c)(2). Thus, in one proceeding before one court, the

defendants may defeat all the alleged claims against them, thus removing any threat of multiple litigation. Under the Second Circuit's decision in *Eisen*, the defendants, although potential recipients of this benefit, cannot under any circumstances, be ordered to pay for the very vehicle from which this benefit is derived—CLASS ACTION NOTICE.

In contrast to this benefit to defendants, a plaintiff seeking to be a class representative does not derive such tangible benefits. The class action does increase a plaintiff's economic ability to commence and undertake litigation it might otherwise foresake. It truly benefits the absent class members who, but for the class action, would not have their day in court. But the benefit is only realized if the class prevails on the merits.

The Court of Appeals was concerned with the possibility that defendants who initially pay for the costs of notice will not be reimbursed by plaintiffs if after trial the defendants prevail.[6] What the Second Circuit overlooked was that in that very situation—where the defendants received the *res judicata* protection of Rule 23—the defendants should pay for the class action notice, for it is that judicial procedure by which all class members are bound by the final judgment in defendants' favor.[7]

On the other hand, where plaintiffs and the class are successful, there clearly will be a resulting fund available from which the costs of notice can be repaid to defendants who are required to advance such costs.

Accordingly, whichever way the merits are ultimately determined, defendants who are ordered to advance costs

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6. ". . . if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose." *Eisen v. Carlisle & Jacquelin*, — F.2d — (2d Cir. 1973), (App. 96a).

7. In several instances, defendants who received benefits from procedural rulings have either voluntarily or been required to bear the expenses caused by that ruling. See *J&B&S Restaurant Corp., Inc. v. Henry's Drive-In, Inc.*, 353 F. Supp. 389 (W.D.N.Y. 1973); *Nocona Leather Goods Co. v. A. G. Spalding & Bros.*, 159 F. Supp. 269, 271 (D. Del. 1958). (Both cases deal with transfer of venue resulting in greater expenses for plaintiff.)

of notice are protected, either by *res judicata* or by reimbursement from the class recovery.

The *Eisen* District Court sought to apportion the costs of notice among the parties only after preliminarily determining the plaintiff's "likelihood of success."[8] It is clear that the greater the plaintiff's likelihood of success, the lesser the risk that a fund will not result from which defendants can be reimbursed for any advance of costs. The District Court was employing its discretion in administering Rule 23; it was applying the Rule so that it would not be a paper tiger but rather an effective judicial tool to be used in the private enforcement of the antitrust laws.

Amicus Curiae respectfully suggests that the *Eisen* District Court not only acted properly in holding a preliminary hearing with respect to the issue of which party shall bear the cost of notice, but that the court required more than was necessary in assessing the "likelihood of success." The salient issue with respect to a hearing concerning the burden of "cost of notice" realtes only to whether or not the litigation is *capricious* or *frivolous*[9] and whether or not there is some reasonable basis for the claims alleged. With this finding, the class action has real benefit to defendants, for if successful, defendants will have the broad *res judicata* protection against *bona fide* claims, not

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8. The burden upon a plaintiff to demonstrate this "likelihood of success" prior to completion of the discovery process is a heavy one, particularly in antitrust cases where often the defendants have exclusive knowledge of the acts, events and evidence from which the violations can be proved. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) (". . . the proof is largely in the hands of the alleged conspirators. . . .")

9. See *Philadelphia Electric Co. v. Anaconda American Brass Company*, 43 F.R.D., 452, 458 (E.D. Pa. 1968), an early and leading decision under Amended Rule 23: "It is enough for present purposes to state that the indictments, the sentences imposed thereunder, and some of the results of the discovery to date, together *warrant a finding that plaintiffs' claim of conspiracy may have merit and is a genuine issue in this litigation.*" [Emphasis added.]

frivolous and capricious claims. Moreover, with respect to the burden of costs of notice, the plaintiff has the opportunity to demonstrate that there is substance behind its allegations. Thus, the class action proceeds in the context of meaningful litigation and any chances of potential abuse of the class action device are substantially lessened.

The important reality, and in many instances the lifeblood of successful class action litigation, is that the notice required by Rule 23 be accomplished. If requiring the defendants in a given case initially to pay, either in whole or in part, for such notice advances the litigation, then nothing in Rule 23 prohibits a court from so ordering. Admittedly, Rule 23 is silent as to which party(ies) shall pay for notice to the class.

Rule 23 was born in Equity;[10] accordingly, equitable principles are appropriate for determining which party(ies) must bear the cost of notice. In construing the equitable powers of the courts under Section 16 of the Clayton Act, this Court stated that a Section 16 remedy

> ". . . like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, 64 S. Ct. 587, 592. 88 L. Ed. 754 (1944). Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' *Id.*, at 330, 64 S. Ct. 592." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 129, 131 (1969).

Following this spirit, if defendants ultimately prevail and thus benefit from the class action, equitable principles

10. "The class action was an invention of equity * * * mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

dictate that they pay for the notice. In this way, the efficiency and effectiveness of the class action is guaranteed.

The District Court must be free to exercise its discretion in administering Rule 23 so that the ends of justice are best served. The power to place costs of notice upon a particular party(ies) must be within that discretion.

C. "Fluid class recovery" assures the manageability of class actions and furthers the purpose and intent of the Antitrust laws.

The issue of proof of damages has often been raised by defendants in class action antitrust cases as an unmanageable procedural morass which requires the denial of class action status. Arguments are made that jury trials on the issue of damages for class members will outlive the expected lives of jurors and judges alike; that the issue of each class member's damages raises individual, not common, questions which are so overwhelming that the class cannot be managed. The District Court in *Eisen*, envisioned the great benefits of the class action by resolving at one proceeding the common issues of liability for the millions of class members injured by the alleged violations. As for damages, the court applied the doctrine of "fluid class recovery." By that doctrine, the defendants, if liable, must disgorge to the class all their overcharges as a result of their violations. Allocation of that recovery among the class then follows in proceedings before the court *vis a vis* the defendants or what was the total amount of injury defendants caused this class of plaintiffs as a result of their violations. In this way, the liable defendants must disgorge all their ill-gotten gains. Of course, inherent in this determination is whether the particular case is suitable for the application of the "fluid class recovery" doctrine.

Most recently, the Court of Appeals for the Ninth Circuit cogently recognized that

> ". . . The day is long past when courts, particularly federal courts, will deny relief to a deserving

> plaintiff *merely because of procedural difficulties or problems of apportioning damages." In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, — F.2d — (9th Cir. 1973), 1973-1 CCH Trade Cases, ¶74,733. [Emphasis added.]

The court continued:

> ". . . Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra*, 392 U.S. at 494." *Ibid.*

The distaste for the retention by guilty antitrust defendants of their ill-gotten gains has repeatedly been expressed and emphasized by the courts.[11] The "fluid class recovery" doctrine assures that antitrust defendants will not profit by their wrongdoing and that defense of antitrust violations committed by them is more than a nominal "expense of doing business" to the wrongdoers. Rather, damages will be awarded to the class as a whole,[12] not just to those class members who eventually come forward to prove claims. In this way, the impact of private enforcement of the antitrust laws is strengthened and the Congressional intent promoted.

As to unclaimed portions of the "fluid class recovery" by class members who do not come forward or who no longer exist, that problem is also susceptible to solution by appropriate judicial machinery. The problem is further alleviated where States and political subdivisions comprise

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11. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir. 1971); *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 74 (D. N.J. 1971); *In re Pretrial Proceedings in Western Liquid Asphalt Cases, supra.*

12. The "fluid class recovery" is entirely consistent with the "True Class Action" under former Rule 23. However, the amendment in 1966 removed the distinctions between "true," "hybrid" and "spurious" class actions, giving them all the *res judicata* effect in favor of defendants.

the class, for excess funds can be employed for a public use. See *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971). Moroever, with respect to States and their political subdivisions, where appropriate, distribution can be made on a demographic basis. See *City of Philadelphia v. American Oil Co.*, Civ. No. 647-68 and related cases (D. N.J.). With respect to non-governmental entity classes, unclaimed funds may be subject to state escheat laws. Whatever the ultimate machinery utilized, the district court must be allowed to exercise its discretion to determine whether "fluid class recovery" is appropriate in a particular case and if so, the manner of implementation.

Shortly after its promulgation, Professor Kaplan warned of Rule 23:

> "There are some who are repelled by these massive, complex, unconventional lawsuits because *they call for so much judicial initiative and management.* We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and *I do not myself see any subversion of judicial process here but rather a fine opportunity for its accomodation to new challenges of the times.* The class action takes its place in a larger search for pliant and sensitive procedures. . . . Kaplan, "A Prefatory Note," 10 B.C. Ind. & Com. L. Rev. 497, 500 (1969) [Emphasis added].

The District Court in *Eisen* used its "judicial initiative and management" to make workable and manageable the class action procedure so that in that particular case justice would be accomplished. In *Eisen*, as in many cases commenced as class actions, without the class action device there is no vehicle which makes economically feasible the prosecution of either the plaintiff's claim or more particularly the claims of class members. Thus, without the class

action, the "doors of justice are closed"[13] and private antitrust enforcement would be "substantially reduced in effectiveness."[14] Indeed, the Court of Appeals in an earlier *Eisen* decision, 391 F.2d 555, 560 (2d Cir. 1968) cogently recognized the essential role of Rule 23:

> "Class actions serve an important function in our judicial system. By establishing a technique whereby claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."

With the availability of class actions curtailed, which is the ultimate result of the Second Circuit's decision, no longer will the States, their political subdivisions or their citizens constitute an effective source of enforcement of the federal antitrust laws. Moreover, even where states proceed alone, in situations where the costs of suit approximate or exceed the amount of damages, states will be forced to proceed with their cases through trial in order to take advantage of the provisions of Section 4 of the Clayton Act, awarding to the successful plaintiff both costs and attorney's fees. Thus, settlement of these protracted and complex cases may be less economical and less frequent,[15] resulting in additional burdens upon the courts.

13. *Weeks v. Bareco*, 125 F.2d 84, 88 (7th Cir. 1941).

14. *Hanover Shoe v. United Shoe Machinery Corp.*, *supra*, 392 U.S. at 494.

15. The Court may take judicial notice of the fact that a great many of the non-federal governmental antitrust suits brought as class actions have been settled prior to trial. E.g., *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969); *State of West Virginia v. Chas. Pfizer and Co.*, *supra*; *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *City of Philadelphia v. Interpace Corporation*, Civ. No. 48008 and related cases (E.D. Pa.); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary*

In contrast, the application of the "fluid recovery" in the class action context, if appropriate in a given case, obviates these problems. At the same time, it encourages private enforcement of the antitrust laws; it discourages future violations; it redresses the aggrieved parties for the damages they suffered; it strips the violators of their tainted profits. Moreover, judicial economy and efficiency are achieved. Indeed, the "fluid recovery" doctrine faithfully serves all the Congressional intentions upon which the antitrust laws were founded and the equitable considerations upon which Rule 23 was based.

CONCLUSION

This Court is called upon to determine significant questions affecting the full scheme of enforcement of the antitrust laws as well as other violations of law inflicting redressable injury upon classes of persons. Moreover, this is the first occasion upon which this Court has accepted the invitation to construe and apply the provisions and purposes of class action Rule 23, Federal Rules of Civil Procedure. The significance of this ruling reaches far beyond the instant case and permeates the very fabric of effective private antitrust enforcement as it exists today.

Amicus Curiae, Commonwealth of Pennsylvania, respectfully urges that this Court uphold and adopt the type of flexible and innovative application of Rule 23 as decided by the District Court in the case *sub judice*, an application vital to the effective and meaningful protection of non-federal governmental and individual rights and necessary for the continued vigorous enforcement of the antitrust laws. The conflicts between the District Court's decision and the decision of the United States Court of Appeals for

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Corp., Civ. No. 41774 (E.D. Pa.); *City of Detroit v. Grinnell Corporation*, Civ. No. 68-4026 (S.D.N.Y.); *City of Philadelphia v. American Oil Co.*, Civ. No. 647-68 and related cases (D.N.J.).

the Second Circuit in this case represent a forked lane; one path promoting the Congressional intent and an efficient judicial process; the other stifling that intent and process.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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Brief of the State of California, Amicus Curiae

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Brief of the State of California, Amicus Curiae

INTEREST OF THE STATE OF CALIFORNIA

The State of California files this amicus curiae brief in support of plaintiff Morton Eisen pursuant to Rule 42 of the Rules of this Court.

The State of California has a substantial interest in the development and application of Rule 23, F.R.C.P. for the purpose of adjudicating the rights and claims of its citizens. The State is particularly interested in class actions on behalf of citizen consumers who because of the small size of

their individual claims will be unable to recover damages in the absence of effective class action rules. California itself has filed consumer class actions with the State acting through its attorney general as a representative party.[1]

California directs its attention in this brief to "Fluid Recovery" a concept necessary for the protection of the interest of California's citizens, effective private enforcement of the antitrust and other laws, and efficient judicial administration of complex litigation.

Since states cannot represent citizen consumers Parens Patriae, *California v. Frito Lay, Inc.*, 474 F.2d 774. (9th Cir. 1973.) Cert. denied 412 U.S. 908 (1973), the only remaining remedy for injured consumers who are unable to bring their own action is a consumer class action. *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266 (1972); *Vasquez v. Superior Court* 4 Cal.3d 800, 807-8, 484 P.2d 964 (1971); *Daar v. Yellow Cab Co.* 67 Cal.2d 695, 715, 433 P.2d 732 (1967). The consumer class action, however, would be a meaningless gesture without "Fluid Recovery".

ARGUMENT

Fluid Recovery Is Proper and Workable

"Fluid Recovery" occurs when the representative party in a Rule 23 class action litigates the issue of damages on behalf of the entire class as a whole without requiring individual class members to appear. Evidence of the damages sustained by the entire class is presented to the trier of fact, consistent with the standards in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946), and a lump sum judgment is entered against defendants and in favor of the class as a

1. *State of California v. Chas. Pfizer & Co. Inc.*, et al., D.Minn. 4-71 Civ. 399; *State of California v. Bristol Myers*, et al., D.D.C. Civ. 2181-71.

whole. Thereafter, the judgment fund is available to the class members under the supervision of the district court.

In effect, defendants' liability is determined as a whole rather than as a sum of its parts. Since "a whole is equal to the sum of its parts" defendants are not exposed to any more than a single, albeit, total accounting under the law for their wrongdoing.

Either the denial of a class action or allowance of a consumer class action without "Fluid Recovery" permits defendants to utilize legal procedures to minimize their liability by discouraging or preventing participation in the litigation by potential class members. The practical result is that the courts become a shield for wrongdoers, a concept alien to any system of justice.

The issue in an industry where the products affected by an antitrust conspiracy are purchased in small quantities by consumers who seldom keep receipts of their purchases was aptly characterized by the district court in *California v. Frito Lay, Inc.*, 333 F.Supp. 977, (CD Calif. 1971) rev'd 474 F.2d 774 (9th. Cir. 1973) Cert. denied 412 U.S. 908 (1973).

> ". . . But what corporation would not risk violation of the antitrust laws where maximum penalties are miniscule compared to the potential harm to a public unable to meet the 'technical' requirements of proof of damage? Or, even more to the point—what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gain, three times over, were the ultimate result of a proven price-fixing conspiracy? Putting the question is its own obvious answer. . . ." (Id. at 981).

Similarly, Judge Miles Lord in approving "Fluid Recovery" in the antibiotic drug cases stated:

> ". . . The most misleading of their [defendants'] arguments characterizes a class-wide recovery as a

> 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the 'pot of gold' created by their illegal activities. And the success of their scheme and the size of the 'pot' would certainly be no basis for leaving the money in their hands." *In re Antibiotic Antitrust Action*, 333 F.Supp. 278, 287 (S.D.N.Y. 1971).

The problem of disposition of unclaimed funds after a "Fluid Recovery" ought not to inhibit use of the concept. Certainly, a wrongdoer's liability should not be mitigated and the fruits of his wrongdoing become his windfall because the "true owner" does not come forward. This kind of problem has never stifled the ingenuity of courts.[2]

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan* 307 U.S. 183, 194 (1939).

In *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77 (S.D.N.Y. 1970) aff'd 446 F.2d 1301 (2nd Cir. 1971) Cert. denied 404 U.S. 1005 (1971) the court when considering the necessity of developing equitable remedies quoted as follows from *Mills v. Electric Autolite Co.*, 396 U.S. 375 (1970):

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2. See *Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203 (D.C. Cir.), Cert. denied, 373 U.S. 913 (1963); *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77 (S.D.N.Y. 1970). *Market St. Ry. Co. v. Railroad Commission* 28 Cal.2d 363, 171 P.2d 875 (1946).

Initially class members would claim against the judgment fund. Unclaimed funds would be administered by the court under its broad powers of equity. See *Daar v. Yellow Cab*, supra, n. 15 at 715.

Escheat is a final resort.

See *United States v. Klein* 303, U.S. 276 (1938).

"We [the Supreme Court] held in *Borak* that upon finding a violation the courts were 'to be alert to provide such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief. 377 U.S., at 433, 434 [84 S.CT. 1555, 1560, 12 L.Ed 2d 423]. • • • In selecting a remedy the lower courts should exercise 'the sound discretion which guides the determination of courts of equity,' keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles,* 321 U.S. 321, 329-330 [64 S.Ct. 587, 591-592, 88 L.Ed. 754] (1944)." 312 F.Supp. at 91-2.

The court then continued:

"Therefore, the court may, on the basis of Section 27, fashion an appropriate remedy to effectuate the purpose of the 1934 Act, and to deter future violations of Section 10(b) and Rule 10b-5." Id. at 92.

Fluid Recovery Is Not a Novel Procedure

A procedure of adjudicating in lump sum the claims of absent class members is not novel. Indeed before Eisen III, such a procedure was approved by the Second Circuit. In *Dickinson v. Burnham* 197 F.2nd 973 (2nd. Cir. 1952), the court not only approved a "Fluid Recovery" but held that plaintiffs (counter-claim defendants) were not entitled to depose and call individual class members before the jury.[3]

3. In *Dickinson* following an appeal, a class action was brought against the plaintiff in the original proceedings by an intervenor. The action was to recover money allegedly obtained by plaintiff by fraud. The trial court decided that the action was a spurious class action under old Rule 23. Following the trial of the factual question of the existence of the fraud, the court deferred final judgment and sent notices to the members of the class. Ultimately 70 claims were filed out a class of 159. Judgment was entered against the plaintiff for the full amount he had fraudulently obtained from the *entire class.*

"Our question is . . . how far Dickinson can object to a transfer of the entire fund from his hands. As to this specific question we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably. Obviously its solution was an eminently practical one; it declined to allow the wrongdoers to escape for some theoretical protection to or against persons who after all these years and having failed to respond to notice were surely not actually disposed to claim participation. By taking charge of the fund as it did, it afforded all necessary protection to the plaintiff [counter-claim defendant] while making a fair distribution to the actual parties in interest. And the result seems not merely practical, but legally sound (197 F.2d 979-80)

Plaintiff's [counter-claim defendant] claim for a plenary trial on the right of each intervener coming in after the interlocutory judgment, including the taking of depositions and a jury on each, was properly overruled. Plaintiff had already had his day in court as to his general liability; he could not relitigate his duty to the class as a whole. Left only was the question of "essentially supervisory jurisdiction over the distribution among the class" of those entitled to the fund." Id. at 980-981.

Similarly in *Daar v. Yellow Cab Co.*, Supra:

In an effort to undermine the sufficiency of the complaint, defendant argues that even if a class action were permitted, the appearance of each class member in court still would be required, "for each claimant must appear and testify to the facts, among many others, that he rode a taxicab within the statutory period, the number of such rides, the fare paid for each, and the special damages to him, if any, beyond those alleged in [plaintiff's] complaint. It is perfectly obvious

> that if [plaintiff] is allowed to maintain a class action, every single claimant must appear in court and prove his claim." However, the complaint alleges that the exact amount of the overcharge in each of the two counts is known to the defendant and can be ascertained therefrom. Assuming these facts to be true, as we must here, no appearance by the individual members of the class will be required to recover the full amount of the overcharges in each count. (67 Cal.2d 715-16).

In bondholder class actions "Fluid Recovery" has always been the practice e.g. *United States v. Klein* 303 U.S. 276 (1938).

Rule 23(d) F.R.C.P. by its own provisions contemplates broad discretion by the trial court in the framing of procedures for efficient judicial administration of class actions consistent with due process.[4] In this vein, trial courts should endeavor to adopt procedures such as "Fluid Recovery" that will eliminate the difficulties likely to be encountered in the management of a class action.

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4. 23(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

It is hypocritical for a court to blind itself to the use of modern techniques in resolving the problems presented by complicated litigation involving large numbers of claimants and large volumes of data and then find a class action to be unmanageable.[5]

CONCLUSION

Class actions are a necessary tool of judicial administration. The use of "Fluid Recovery" is in furtherance of the purposes of Rule 23, F.R.C.P. and promotes effective enforcement of substantive laws for the protection of numerous consumers with small claims. The use of the "Fluid Recovery" concept in the *Eisen* case should be approved by this Court.

Respectfully submitted,

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Amicus Curiae.

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5. Many solutions to class action problems are now and will continually be provided by the Manual issued by the Judicial Panel on Multidistrict Litigation.

DEC 10 1973 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and all other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In the

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October Term, 1973

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Morton Eisen, on Behalf of Himself and all other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

—v.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the within brief *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for respondents have declined to consent.

The American Civil Liberties Union is a nationwide membership organization dedicated to perserving rights guaranteed by the United States Constitution. Since its establishment in 1920, the ACLU has been deeply involved in exploring the meaning and scope of procedural due process of law and has appeared in literally hundreds of cases in this Court involving construction of the due process clause.

In addition, since the adoption of Rule 23 of the Federal Rules of Civil Procedure, the ACLU has consistently utilized class actions as an effective device in the protection of constitutional rights. Since the decision below presents the application of the due process clause to the evolving body of law under Rule 23 F.R.C.P. and threatens the viability of class actions as an effective remedial device, we respectfully submit the within brief *amicus curiae* in the expectation that the Court will find it of assistance in the resolution of the constitutional issue raised herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and all other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of *amicus* appears from the foregoing motion.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 479 F.2d 1005.

Constitutional and Statutory Provisions Involved

This case involves the relationship between Rule 23 of the Federal Rules of Civil Procedure and the Due Process clause of the Fifth Amendment to the United States Constitution.

Statement of the Case

This proceeding, commenced in May, 1966, is an attempt to invoke the provisions of the nation's anti-trust laws against allegedly unlawful brokerage practices in connection with the transfer of "odd-lot" * parcels of stock on the New York Stock Exchange from 1962-1966.

Since the number of affected purchasers and sellers of odd-lot parcels exceeds 6,000,000 and since the average pecuniary loss to each is estimated at $1.30, resort to individual actions to redress the alleged anti-trust violations would be neither practical nor effective. Accordingly, plaintiff sought to prosecute his action pursuant to the newly liberalized provisions of Rule 23, as a class action within the meaning of Rule 23(b)(3).

The District Court, confronted with a proposed class of approximately 6,000,000 members, evolved the following notice provisions:**

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* "Odd-lots" are parcels of stock containing fewer than 100 shares.

** After a preliminary hearing on the merits, Judge Tyler assessed 90 per cent of the cost of notice against defendants, based upon his finding that plaintiff was extremely likely to prevail on the merits. 54 FRD 565.

(a) individual, actual notice to those class members involved in ten or more transactions;

(b) individual, actual notice to 5,000 randomly selected class members;

(c) notice by publication in leading financial newspapers directed to the remaining members of the class.

Defendants-Respondents objected to Judge Tyler's proposed notice provisions on the ground that they were unfair to those members of the plaintiff class who might wish to pursue their claims individually. The panel below accepted respondents' assertions and ruled that class action status must be denied herein unless and until plaintiff provides actual notice of the pendency of this action to the over 2,000,000 identifiable members of the plaintiff class. Thus, one basic issue raised herein is the nature of the notice required under Rule 23 and the Due Process Clause as a precondition to the grant of class action status.

Questions Presented

1. Do Respondents possess standing to assert the alleged right of absent class members to actual notice of the pendency of this action?

2. Assuming that the adequacy of the District Court's notice provisions is properly before the Court, do they satisfy the Due Process Clause of the Fifth Amendment?

ARGUMENT

I.

Respondents lack standing to assert the due process rights of members of the plaintiff class.

Respondents, in urging that class action status be denied because of inadequate notice to members of the plaintiff class, have appointed themselves guardians of the due process rights of those who may wish to sue them and, with the concurrence of the panel below, have successfully parlayed their role as guardians of the due process clause into a *de facto* defense against liability to the very persons whose constitutional interests they purport to protect. Of course, the practice of asserting an absent third party's theoretical constitutional rights to his or her practical detriment is not unknown to this Court.

In *Lochner* v. *New York,* 198 U.S. 45 (1905), an employer who had been convicted under a New York statute regulating maximum hours of employment successfully urged reversal of his conviction on the ground that New York's statute violated the constitutional rights of his employees to work longer hours.

In *Coppage* v. *Kansas,* 236 U.S. 1 (1915), an employer who had been convicted under a Kansas statute outlawing "yellow dog" contracts successfully urged reversal of his conviction on the ground that Kansas' statute violated the constitutional rights of his employees to set their own terms and conditions of employment. See also, *Adair* v. *United States,* 208 U.S. 161 (1908).

In *Morehead* v. *New York ex rel. Tipaldo,* 298 U.S. 587 (1936), an employer who had been convicted under a New York statute regulating minimum wages successfully urged reversal of his conviction on the ground that New York's statute violated the constitutional rights of his employees to agree to work for less than the prescribed minimum. See also, *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923); *Murphy* v. *Sardell,* 269 U.S. 530 (1925).

Unfortunately, despite the fact that the *Lochner-Coppage-Morehead* line of authority purported to protect the constitutional rights of absent third parties, the task of articulating and defending those rights was entrusted, in each case, to a "guardian" whose interests conflicted with those of the absent third parties, without any consideration of his standing to assert their rights. Compare, *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 513 (1937).

Nor has the practice of asserting third parties' rights to their detriment abated with the demise of the *Lochner-Coppage-Morehead* line of authority. For example, in *Washington* v. *Fox,* No. 73-653, this Court is confronted with the spectacle of a migrant camp owner arguing that access for union organizers to his migrant camp would violate the ". . . right to privacy of the migrant worker . . ." Petition for certiorari, *Washington* v. *Fox,* 73-653 at p. 9.

In the instant case, respondents similarly attempt to "protect" absent third parties to their practical detriment. Respondents argue that class action status—the only practical vehicle available for testing the legality of their allegedly unlawful practices—is unavailable because all members of the plaintiff class possess a constitutional

right to actual notice of the pendency of this action and that, unless and until petitioner satisfies that Herculean notice requirement, it would be unfair to members of the plaintiff class to proceed as a class action. *Amicus* respectfully suggests that before permitting respondents to defeat class action status herein by asserting the alleged constitutional rights of absent third parties, this Court should examine respondents' standing to do so.

In recent years, this Court has limited attempts by defendants to avoid liability by asserting the constitutional rights of third parties. E.g., *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L. Ed.2d 830 (1973), *United States* v. *Raines*, 362 U.S. 17 (1960). Even where the defendant and the third party whose rights he seeks to assert share a basic community of interest, this Court has been extremely reluctant to entertain claims which focus more on the hypothetical rights of third parties than on the rights and liabilities of the parties actually before the Court. Where, as here, the defendants-respondents' interests are in basic conflict with those of the plaintiff class, it would defy precedent to permit respondents to assert the alleged due process rights of absent plaintiffs to defeat the only effective procedure available to the plaintiff class to secure redress. The analogy to *Lochner* and its progeny is too plain to ignore.

Mr. Justice White noted in *Broadrick* that judicial reluctance to entertain claims based upon the rights of third parties reflects more than judicial hypertechnicality. Rather it is premised on at least two basic policies which the standing doctrine is designed to promote: 1) the avoidance of unnecessary constitutional adjudication and 2) the assurance of proper presentation of the facts and law. Both policies would be violated by permitting respondents

to defeat class action status by asserting the alleged rights of members of the plaintiff class.

First, whatever the outcome of this litigation, it is highly unlikely that any member of the plaintiff class will actually contest his or her inclusion within the plaintiff class. Therefore, it may well never become necessary to test the constitutional sufficiency of the District Court's notice provisions.

If plaintiffs are victorious,[1] members of the plaintiff class would not be likely to contest their right to participate in a recovery. If plaintiffs do not prevail, a member of the plaintiff class would be likely to challenge his inclusion in the plaintiff class only if 1) he possessed a sufficient personal stake to warrant the expense of an additional lawsuit; 2) he believed his claims to be sufficiently strong to outweigh the *stare decisis,* and perhaps collateral estoppel, impact of an adverse holding in an identical case; and 3) he had not received actual notice of the prior action.

Whatever the likelihood of such a subsequent challenge, it would seem to be the more appropriate judicial setting in which to explore the constitutional rights of absent members of the plaintiff class to actual notice herein.[2] Unless and until such a challenge is posed in the context of a concrete factual setting by a disgruntled member of the plaintiff class, it would be an unwarranted departure from

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[1] After a preliminary investigation of the merits, the trial court appeared to believe that plaintiffs were extremely likely to prevail on the merits. 54 FRD 565.

[2] If, in such a subsequent proceeding, the Court were to uphold the constitutional sufficiency of the notice provisions, the plaintiff would, of course, be barred by *res judicata.* If the Court were to rule them constitutionally defective, the plaintiff would be permitted to go forward, burdened only by the *stare decisis* effect of the prior adjudication.

traditional practice for this Court to unnecessarily decide a complex and difficult constitutional issue which may well never be presented for decision.

Second, the heart of the standing doctrine has been a judicial assumption that the enlightened self interest of adverse parties will result in a thorough ventilation of all relevant facts and law, thereby permitting courts to make a decision on the best possible record. However, where, as here, the enlightened self interest of one party is arguably in conflict with the best interests of the absent third parties whose rights he seeks to assert, the standing model breaks down, since one can expect a party to ventilate only those facts and theories which advance his own interests. Not surprisingly, therefore, nowhere in respondents' papers is any consideration given to the non-existence of alternative vehicles for recovery should class action status be denied. Nor do respondents address themselves either to the likelihood of members of the plaintiff class asserting, or even wishing to assert, their own rights; or to what procedure would serve the best interests of the members of the class. If the constitutional rights of third parties are to be determined in their absence, surely the spokesman for the absent third parties should not be one with whom their interests directly conflict.[3]

Accordingly, *amicus* respectfully suggests that the constitutional sufficiency of the notice ordered by Judge Tyler is not appropriately before this Court, first, because respondents lack standing to contest it and, second, because it is not ripe for judicial consideration.

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[3] Thus, *amicus* suggests that should a District Court wish to consider the due process rights of absent members of the plaintiff class, it should consider appointing a "special guardian" to articulate their best interests.

II.

The notice prescribed by the District Court satisfied the requirements of the due process clause under the facts and circumstances of this case.

Amicus has urged that consideration of the due process rights of absent members of the plaintiff class be deferred until a member of the class himself seeks to raise the issue in a subsequent proceeding, or until a Court appointed special guardian—acting solely in the best interests of the class—deems it appropriate to raise the issue. However, to the extent the sufficiency of the notice directed by Judge Tyler is appropriately before the Court, we believe it satisfies the requirements of procedural due process of law under the facts and circumstances of this case.

It is, of course, a truism to note the accuracy of Mr. Justice Frankfurter's observation in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149 (1951) that:

> ". . . 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and

stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." 341 U.S. at 162-163.

Thus, in measuring the constitutionality of the notice procedure utilized by the District Court, one must, in Mr. Justice Frankfurter's words, identify:

> "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged [and] the balance of hurt complained of and good accomplished . . ." 341 U.S. at 164. See also, *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

Applying Mr. Justice Frankfurter's analysis to the facts of this case, it becomes necessary, first, to identify "the precise nature of the interest that [would be] adversely affected" by a failure to provide actual notice to each member of the plaintiff class. Unfortunately, the panel below failed to address itself to this issue, relying instead upon an unsupported assumption that the interest was substantial. However, an analysis of the facts and circumstances of this case reveals that the potential causes of action of individual members of the plaintiff class which might be affected by Judge Tyler's notice requirements are far from substantial. First, it appears that the statute of limitations has run on any individual claim which might be asserted by a member of the plaintiff class. Second, the

relatively small financial loss suffered by each individual class member renders it extremely unlikely that he would elect to pursue an individual, rather than a class, remedy. Finally, the tenacity with which the named plaintiff has pursued this matter demonstrates his capacity to adequately represent the interests of the class. Thus, the "interest" which may be adversely affected by the notice procedure prescribed by the District Court consists of a time-barred cause of action for a nominal sum which is already being adequately and competently pursued in a representative capacity by the named plaintiff—hardly the type of substantial interest which the due process clause has traditionally been invoked to protect. Compare, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593 (1972) with *Goldberg* v. *Kelley*, 397 U.S. 254 (1970).

Having identified the relatively insubstantial interest at stake, the remaining questions posed by Mr. Justice Frankfurter's analysis militate in favor of upholding the notice procedure suggested by the District Court. The obvious reasons for its adoption and the lack of any practicable alternative, together with the "balance of hurt complained of and good accomplished" establish that Judge Tyler was well within the limits of the due process clause in evolving workable procedures under which this action could go forward.

Of course, while the procedures suggested by the District Court appear to be constitutionally appropriate in the context of the facts and circumstances of this case, should the "interests adversely affected" be more substantial in future cases, it may well be necessary for District Courts to impose more stringent notice requirements to

satisfy constitutional norms. However, *amicus* respectfully suggests that the adoption of such rules should await the factual development and case by case analysis which is the traditional basis for the enunciation of constitutional doctrine.

Finally, in allocating the cost of the notice procedure on the basis of a preliminary hearing on the substantiality of plaintiffs' cause of action, Judge Tyler was well within his discretionary authority. E.g., *Ostapowicz* v. *Johnson Bronze Co.*, 54 FRD 465 (W.D. Pa. 1972); *Rothman* v. *Gould*, 52 FRD 494 (S.D.N.Y. 1971); *Feder* v. *Harrington*, 52 FRD 178, 184 (S.D.N.Y. 1970); *Berland* v. *Mack*, 48 FRD 121 (S.D.N.Y. 1969); *Dolgow* v. *Anderson*, 43 FRD 472 (E.D.N.Y. 1968). Indeed, if one could design an ideal system for administering the notice aspects of Rule 23, it would make maximum use of the experience and abilities of the nation's district judges. Judge Tyler acted in the best traditions of the federal judiciary and his orders should be reinstated.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals for the Second Circuit should be reversed and the order of the District Court should be reinstated.

Respectfully submitted,

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December 1973

SUPREME COURT, U. S.

DEC 21 1973

MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1973

No. 73-203

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v.

CARLISLE & JACQUELIN, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF ALABAMA, ET AL. AS AMICI CURIAE

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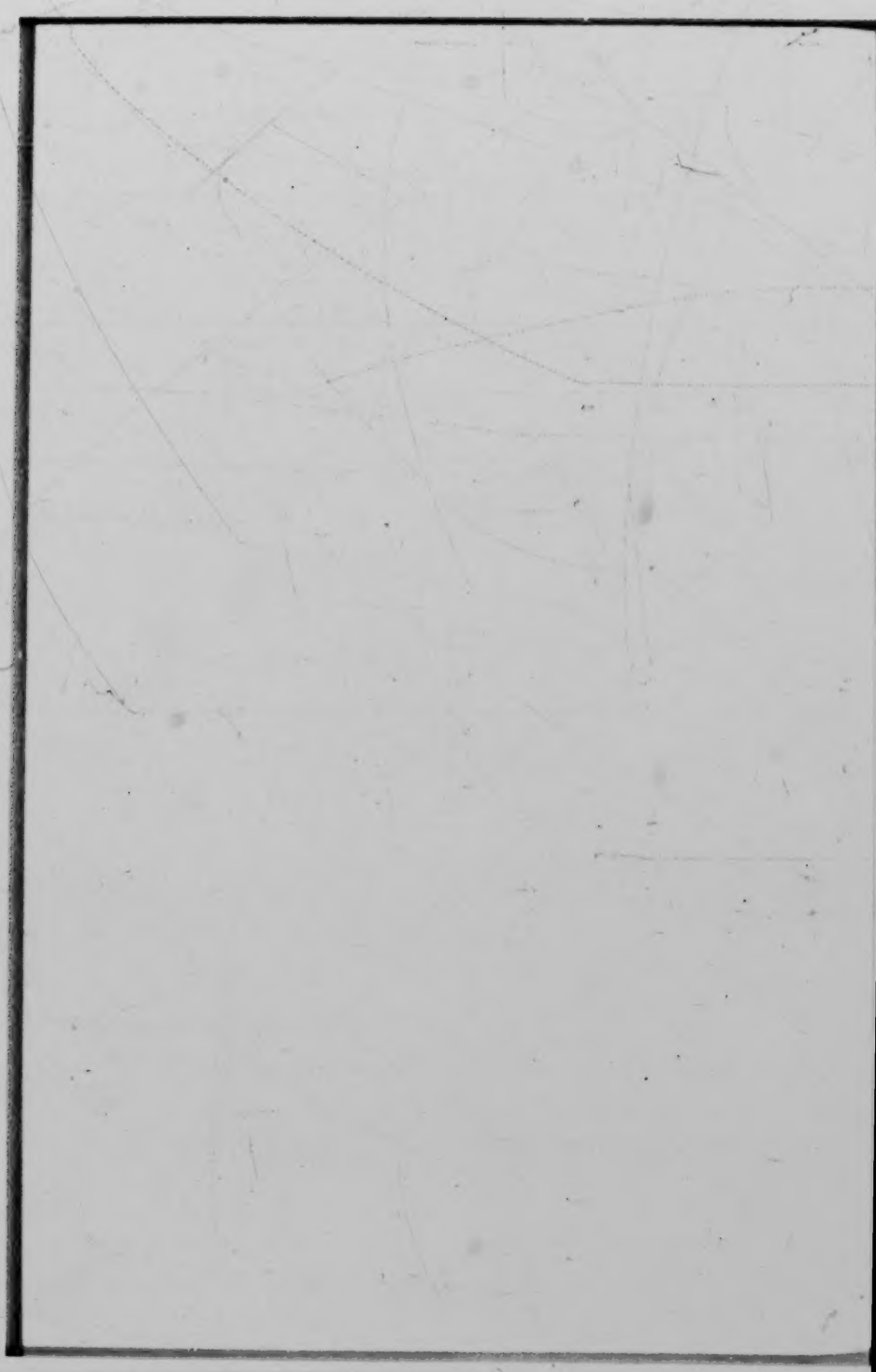
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,
Petitioner,

v.

CARLISLE & JACQUELIN, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE STATE OF ALABAMA, ET AL. AS AMICI CURIAE

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of Alabama, Alaska, Arizona, Florida, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, and Virginia.

INTEREST OF THESE AMICI CURIAE

During the past decade, these States, like most of the States of the Union, have been increasingly active as plaintiffs and class representatives in litigation under the federal antitrust laws. This activity has been motivated by a number of governmental interests: protection of their own budgets from the depredations of suppliers of goods and services who violate the antitrust laws; similar protection of the budgets of subordinate political entities (which receive substantial State aid); and protection, as an aspect of their role as *parens patriae,* of individual citizens victimized by antitrust violations. Such State and local government antitrust enforcement under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) not only recoups past excess charges but—at least as important—enhances the deterrent force of the inherently limited enforcement activities of the United States Department of Justice. See, *e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-131 (1969). The States consider such litigation essential to their welfare and that of their citizens.

Rule 23 of the Federal Rules of Civil Procedure, as amended in 1966, is a keystone of this antitrust enforcement program. The procedures established by that Rule—and particularly subsection (b)(3), which generally governs class actions seeking damages—are the foundation of the States' representation of subordinate political entities, which number in the hundreds in many States and commonly have insufficiently large claims for conventional joinder. In many instances a State's own proprietary claim is insufficient to warrant the commitment of resources required for major litigation unless the State can combine its

claim with those of subordinate entities. And consumer actions—where class members may run to many thousands if not millions in a particular State—obviously depend upon creative utilization of the procedures of Rule 23. It is these States' concern particularly with consumer class actions that prompts them to urge the Court to correct the serious distortion of the developing law under Rule 23 in the panel opinion below.

This Court's recent decision in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972)—while rejecting a Clayton Act claim for damages to a State's general economy—strongly suggested (at 266) the appropriateness of a State's representation of its consumer citizens in antitrust class actions. *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972), endorsed a State Attorney General's "common-law duty to protect the public and private purse as a matter of general welfare" and the State's consequent "standing to represent private consumers"; that court further noted with approval (*ibid.* n. 4) the certification of consumer class actions in the same litigation with States as representatives for their citizens, *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972). States have successfully served as class representatives for their citizen consumers in the various *Antibiotics* cases, *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2 Cir.), *certiorari denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (SDNY 1971). Each of these *amici curiae* has been a consumer class representative in the *Antibiotics* litigation (which has for the most part been settled)

and in the *Ampicillin* litigation, where trial preparation is in progress.[1]

Although the holding below would not be fatal to the consumer class actions involving prescription drugs that these States have commenced to date,[2] the panel opinion poses a grave threat not only to State

[1] Each of these States also represents a class of subordinate political entities (cities, counties, hospital districts, etc.) in these cases. In addition, they also represent governmental classes in other pending cases—*The Cast Iron Pipe Antitrust Cases*, N.D. Ala., S. Div., C.A. 71-516; *State of Connecticut et al.* v. *General Motors Corp. et al.*, N.D. Ill., E. Div. No. 71 C 830 (Automobile Fleet Discount Litigation).

It is of significance that these are no mere piggyback cases. The States' *Fleet Discount* cases were filed well before the United States began its proceedings. The United States has brought no proceeding paralleling the *Cast Iron Pipe* litigation, where a grand jury investigation was aborted. The State *Ampicillin* cases are for all practical purposes consolidated with the contemporaneous United States case, and the workload is being shared by counsel for the States and the Antitrust Division of the Department of Justice. Thus, the States as plaintiffs and class representatives have a major impact on the subject matter as well as the remedial scope of antitrust enforcement.

[2] In the group of *Antibiotics* cases involving 43 States and several cities, some 38,000 consumer claims were accepted based on purchases aggregating some $16,500,000 and it was ultimately determined that 50% of each claimant's verified purchases should be paid to cover single damages less costs. See *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (SDNY 1970); *Alabama* v. *Chas. Pfizer & Co.*, 1973 Trade Cases ¶ 74,343 (SDNY 1972). Thus, the average individual single damages exceeded $200 ($600 when trebled). Such amounts (which are also anticipated in the similar *Ampicillin* litigation) are ample to warrant the expense of individual claim determination if need be, in contrast to the conclusion below that the anticipated average claim of $3.90 would not justify the expense of individual payment.

Moreover, in the drug cases and other consumer product cases it is impossible to identify class members; thus such cases do not raise the notice problem that the *Eisen* panel found in the fact that some 2.5 million odd-lot purchasers could be identified from computer tapes.

antitrust litigation but also to other kinds of class action, whose general therapeutic effects the States heartily endorse. In particular, the panel's apparently categorical rejection of any form of classwide recovery would, if accepted, drastically diminish the compensatory and deterrent impact of "private" antitrust litigation while also encouraging violators to proliferate procedural obstacles to the determination of damages. More generally, the antediluvian approach taken to problems of notice and proof threatens to stifle the flexibility and creativity that has properly characterized the district courts' work under Rule 23 during its short life since the 1966 amendments. The panel's fundamental misconception of the nature of class actions for damages and the powers of the district courts in managing them must be corrected in the interest of the future development of this procedural tool.

We discuss the following specific questions in this brief:

(1) The court of appeals panel's misapprehension of the requirement of notice to class members specified by Rule 23(c)(2); and

(2) The propriety of classwide assessment of damages and other approaches to determination of damages that are feasible in consumer class actions.[3]

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[3] We do not deal with the court of appeals' purported retention of jurisdiction over the district court's interlocutory determinations of class action issues except to note that such interference by an appellate court with a trial court's management of an ongoing class action is inconsistent with the basic principles of flexibility and discretion that we discuss *infra*.

ARGUMENT

Because of the importance of this first opportunity for the Court to elucidate some of the major points of contention under revised Rule 23, we begin with a brief overview of the fundamental principles of the Rule and their impact upon substantive rights and liabilities. With this preface, we shall then discuss the problems of notice and proof of damages that are principally before the Court.

PREFACE—SOME UNDERLYING PRINCIPLES

It is well to remember that the class action is not a newfangled creation of the draftsmen of Rule 23 but rather, as noted in *Hansberry* v. *Lee,* 311 U.S. 32, 41 (1940), "an invention of equity" that has evolved over many years. In *Ross* v. *Bernhard,* 396 U.S. 531, 541 (1970), the Court observed that "the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law," and went on, in light of the merger of law and equity, to give full meaning to the representative character of such suits.[4]

The concept of the class action was remarkably well developed as early as *Smith* v. *Swormstedt,* 16 How. (57 U.S.) 288 (1853), which upheld the right of several preachers to assert the property rights of some 1,500 of their colleagues who had seceded from the Methodist Episcopal Church. The Court summarized the then state of the law, as follows:

> "The rule is well established, that where the parties interested are numerous, and the suit is for

[4] The Court held that a stockholder as representative stands in the shoes of the corporation he represents to such an extent as to have the same right to jury trial.

> an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others * * *.
>
> * * * *
>
> "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all [are] before the court by representation * * *."

16 How. (57 U.S.) at 302-303. See generally 3B Moore, Federal Practice ¶23.02[1]; Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1967).

Rule 23, as originally promulgated and as revised in 1966, simply formalizes, refines, and to some extent expands upon, these well established equitable procedures—now most notably making them explicitly applicable to separate claims characterized by predominant common questions of law or fact (the "(b)(3)" class action). Throughout, the Rule emphasizes the traditional representative nature of the class action. Rule 23(a) begins with the statement that "One or more members of a class may sue or be sued as representative parties on behalf of all * * *" and specifically distinguishes this procedure from joinder of parties. Rule 23(c)(2) provides that the notice required in a (b)(3) class action

> "* * * shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion * * *."

And Rule 23(c)(3) goes on to provide that

> "* * * The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include * * * those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

Thus the class action, as distinguished from joinder of claims by affirmative action of all claimants, is essentially a procedure for the representation of a group of passive potential claimants by a champion chosen by the Court, subject only to the negative right of members to disclaim the representation if they so choose after reasonable notice. In keeping with this characteristic and with the equitable nature of the procedure, Rule 23 repeatedly emphasizes the trial court's discretionary power over the structure and conduct of a class action and its obligation to use that power in supervising the representative's activities.

Rule 23 is not, of course, alone among the Federal Rules in expanding upon traditional equitable techniques. *Ross* v. *Bernhard, supra,* held that Rule 23.1 made the traditionally equitable derivative suit applicable in litigation with all of the characteristics of an action at law including trial by jury, and noted the Rules' similar development of the equitable devices of intervention and interpleader (396 U.S. at 541 n. 15). See also *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968).

It is well accepted that the procedural innovations reflected in the Federal Rules may have a substantial practical impact upon remedies available to litigants

(or would-be litigants whose rights could not be vindicated absent such procedural devices) notwithstanding the literalistic meaning that might be given to the disclaimer of the Rules Enabling Act that "[s]uch rules shall not abridge, enlarge or modify any substantive right * * *." (28 U.S.C. §2072). Indeed, Professor Hazard has recently observed that "it seems fair to say that procedure's very function is to modify the substantive law. Maitland put it that the substantive law is laid down in the interstices of procedure, and he was of course correct." Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F.R.D. 299, 307 (1972).

This Court's first landmark decision under the Federal Rules, *Sibbach* v. *Wilson & Co.,* 312 U.S. 1 (1941), defined the sphere of the Rules—in the context of discovery—as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them" (at 14). *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438 (1946), observed—in dealing with liberalized service of process under the Rules—that "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants" (at 445). And *Hanna* v. *Plumer,* 380 U.S. 460 (1965), held that the rulemaking power "'includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either" (at 472). Closest to home, this Court in *Ross* v. *Bernhard, supra,* noted with approval that the derivative action rule (now Rule 23.1) had in effect *created* a cause of action in a stockholder to assert a claim for injury

to his corporation under Section 4 of the Clayton Act (at 536 n. 6).

In the light of these authorities, the *Eisen* panel opinion could not justify its decision by positing as a rigid "controlling principle" that "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation" (479 F.2d at 1014). For any procedural Rule that facilitates the assertion of claims inevitably increases the exposure of those who violate the law, and that is all Rule 23 does. The practical obstacles that more archaic procedures threw in the way of consumers' rightful antitrust claims were hardly transmogrified into violators' "substantive rights."

Another cardinal principle of federal procedure is expressed in the mandate of Rule 1 that "These rules * * * shall be construed to secure the just, speedy, and inexpensive determination of every action." This Court has recent occasion to recall the "flexibility and capacity for growth and adaptation [which] is the peculiar boast and excellence of the common law." *Colegrove* v. *Battin,* 93 S. Ct. 2448, 2455 (1973). See also, *e.g., Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966); *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra.*

In sum, we urge the Court to decide the questions presented in this case—and to deal with the extraordinarily sweeping pronouncements of the panel opinion—in light of the axiom that the class action is a creation of equity designed to meet the need of an increasingly complex social and economic system for a method by which a representative may sue on behalf of injured persons unable to sue individually.

In Professor Hazard's words, the development of the class action—both in its equitable origins and in its refinement and expansion in Rule 23—represents an essential "attempt to provide something in the nature of a mass production remedy" for the "mass production wrongs" of modern times (58 F.R.D. at 308) and cannot be viewed "from a 19th Century perspective of substantive law. We have to view it in relation to the substantive legal problems of the 20th Century" (*Id.* at 310). A district judge with wide class action experience has said:

> "It seems to me that this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce, while unwilling to grant a civil remedy against a corporation, which has benefited to the extent of many millions of dollars from collusive, illegal pricing of goods."

Weinstein, *Some Reflections On The "Abusiveness" of Class Actions,* 58 F.R.D. 299, 305 (1972). See also Fullam, *Federal Rule 23—An Exercise in Utility,* 38 J. Air Law & Commerce 369 (1972).

Opponents of class actions have sought to make much of their supposedly intolerable impact on an overburdened court system.[5] The judges on the firing

[5] See, *e.g.,* American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972), to which the panel opinion refers.

line disagree. The Board of Editors of the *Manual for Complex Litigation*—district judges selected because of their extensive experience in the handling of such cases—express these views in the 1973 revised edition of the *Manual,* which followed public hearings at which the views of the bar were solicited:

> "Particularly in consumer class actions, where the potential or actual class members may number in the millions, the assertion of unmanageability is typically pressed upon the court. In considering whether the proposed class action is 'superior,' the court must make a realistic evaluation of the 'other available methods,' keeping in mind the purposes for which amended Rule 23 was designed. For it is just such situations where representative treatment may be most needed, since separate suits by the many plaintiffs, or against the many defendants would pose an intolerable burden on the party opposing the class as well as the judicial system; and denial of the class action might well mean a total denial of relief as a practical matter for the persons injured.
>
> "Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administrative problems posed in a class action by the unusually large number of members of the class, each of whom may have

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The objectivity of this Report is called into question by the identity of its authors, who are prominent defense counsel, and by the one-sidedness of their recommendations, which would for all practical purposes preclude consumer class actions for damages. For an opposing view, see Patrick & Cherner, *Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers,* 28 Business Lawyer 1097 (1973). See also Weinstein, *op. cit. supra,* 58 F.R.D. at 306.

> small monetary claims." [*Manual for Complex Litigation* §1.43 (1973); footnotes omitted.][6]

In contrast to the cataclysmic judgments pronounced by the panel below is the language of *Wilcox* v. *Commerce Bank of Kansas City*, 447 F.2d 336, 348-349 (10 Cir. 1973), written by Senior District Judge Christensen, who is widely experienced in class actions and other major antitrust litigation:

> "Indeed the Rule [23] generally may be at the crossroads, many knowledgeable lawyers and some judges maintaining that it should be completely scrapped; others that it should be substantially revised or reformed; and still others that it should be even more liberally administered to effectuate or promote societal objectives bearing little relationship to economics or practicality. We believe that the solution may well be to continue straight ahead for a time under the present Rule, but to smooth out to a degree the formal obstacles that may be unduly obstructing trial courts on the firing line in realistic and practical applications within their sound discretion and in view of superior opportunity to observe the battle conditions case by case."

Although the class action is a venerable procedural device, its expanded utilization in damage cases under revised Rule 23 is only seven years old. Surely it is too early for any appellate court to hamper the trial courts' exploration of its equitable potentialities on the basis of abstract dogma and untested

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[6] It is also pertinent to note that past claims of an ever-rising flood of antitrust litigation are belied by the 1973 Annual Report of the Director, Administrative Office of the United States Courts, which reports a 9.5 per cent decline in the number of private antitrust cases filed in fiscal 1973.

predictions. To do so would be to retract this Court's promise of a class action remedy for widespread economic wrongs in *Hawaii* v. *Standard Oil Co., supra,* which denied a *parens patriae* damage remedy for such wrongs; the result would be no recompense at all.

I. THE PANEL OPINION MISAPPREHENDS THE FUNCTIONS OF THE INITIAL NOTICE TO CLASS MEMBERS AND IMPOSES UNWARRANTED RESTRICTIONS UPON A TRIAL COURT'S DISCRETION IN CARRYING OUT THOSE FUNCTIONS.

The panel opinion below gave no consideration to the *purpose* of the notice that it found to be "a totally inadequate compliance" with Rule 23(c)(2), except to disparage without explanation the view, attributed to the District Court, that "the first round of notices [is] * * * relatively unimportant" and is merely "envisage[d] * * * as sufficient to get the ball rolling" (479 F.2d at 1010). The opinion nowhere focused upon the language of subsection (c)(2), which contemplates nothing more than notification of class members (1) that they may "opt out" of the class, (2) that they will be bound if they do not, and (3) that they may appear through counsel if they wish; the Advisory Committee Note summarizes the purpose of this mandatory notice as "to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class," and observes generally that "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." The panel's failure to consider the reason behind the notice requirement has, we believe, hampered its understanding of the language of the Rule. For obviously the "best notice

practicable under the circumstances" cannot be evaluated in a vacuum.[7]

The language of the Rule and the Advisory Note and the underlying principles exposed in our Preface leave no room for question that the functions of the initial (c)(2) notice in question are (1) to assist the court in assuring adequate representation of the class and (2) to permit individual recipients of the notice to decline such representation. Only the first of these functions is constitutionally required. *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314-315 (1972), and cases cited therein. We discuss the ramifications of these two functions in inverse order.

While it might be argued in the abstract that each and every class member should be given an opportunity to "opt out" of an action that will determine his rights, the Rule itself recognizes that it is frequently impossible and inconsistent with the concept

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[7] We do not expand upon petitioner's suggestion (Br. 36-38) that the liability aspects of a consumer class action may be determined in a partial class action under Rule 23(b)(1) or (2), as to which notice is not specifically required. We note, however, that the *Manual for Complex Litigation* makes a similar suggestion, stating (§ 1.43) that "The applicability of Rule 23(b)(2) to the type of claim involving a very large class of public purchasers which may likely not all be identified seems particularly apt since, even though money damages may be involved, the disposition is in accordance with equitable principles and designed primarily to stop the violation of law by penalizing it and causing a repayment, perhaps to the public generally, of funds attributable to a violation of law." In addition, the authorities appear unanimous that backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are properly adjudicated under subsection (b)(2) without the more stringent procedural requirements applicable in (b)(3) class actions. *E.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-802 (4 Cir. 1971).

of a class action to attempt that. Implicit in the notion of "the best notice practicable under the circumstances" is the understanding that it will often be something less than actual notice to all class members. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), from which this formula was taken, recognized that universal actual notice could not be required even where it was proposed to take something away from the individuals involved and there was no representation of their interests; *a fortiori*, something less than perfect notice is allowable where a duly chosen representative proposes to confer a benefit on members of a plaintiff class. Surely, therefore, there was no justification for the panel's *ex cathedra* statements below that notice by publication is "a farce" and that a class action should be dismissed "forthwith" if the district court cannot give notice "that could reasonably be expected to notify more than a relatively small proportion of the class" (479 F.2d at 1017).

Professor Kaplan, the Reporter to the Advisory Committee that proposed the 1966 amendments to Rule 23, expressed the view that while the interest of a (b)(3) class member in opting out to litigate on his own "can be high where the stake of each member bulks large and his will and ability to take care of himself are strong, the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967). That the latter is true in consumer class actions is shown by the empirical evidence noted in *Berland* v. *Mack*,

48 F.R.D. 121, 129 (SDNY 1969), and by the experience in certain of the *Antibiotics* cases, where (c)(2) notices mailed to consumers at great expense resulted only in a trivial number of opt-outs.[8] The opt-out function of the notice in question is, therefore, of extremely limited real value in consumer class actions.

With respect to the role of the (c)(2) notice in testing class members' consent to the proposed representation of their interests, Professor Kaplan observed, incontestably, that

> "[When] large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up."

Kaplan, *op cit. supra,* at 396. As we have noted, the Advisory Committee Note recognized the impact of the cohesiveness of the class and the effectiveness of the representation on notice requirements. While these considerations obviously vary from case to case,

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[8] Out of some 6,300,000 California residents to whom notices were mailed, only some 6,000 responded. Of these, 5,041 requested exclusion from the suit, 3,670 without giving any reasons. The opt-outs did who did give reasons indicated that they had not purchased the drugs in suit (992), could not recall whether they had made purchases or not (233) or had no records (146) and presumably most or all of the others were motivated by the same considerations. Only 6 respondents (one ten-thousandth of one percent) indicated a desire to be represented by their own counsel, and apparently none objected specifically to the representation they would be given by th Attorney General. These statistics are derived from the record in *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,* SDNY No. M19-93A, assigned to Judge Miles Lord of the District of Minnesota.

it is apparent that the need to test the representation by notice is at a minimum in a case where the interests of large numbers of citizen consumers are being asserted by a State Attorney General elected by them. See p. 3, *supra*. And the sampling approach taken by the district court in the present case seems ideally designed as a practicable means for testing the representation where individuals seek to represent such classes.

The panel's unconsidered assumption that class members must be brought before the court at the outset of the litigation thus misreads Rule 23(c)(2) and misapprehends the basic concept of the representative suit. Moreover, it fails to recognize the distinction betwen the initial representation notice and the subsequent notice that would normally be required under subsection (d)(2) to assure the fair distribution of damages obtained by the class representative on behalf of the class members. In the latter context, each class member does have a separate individual interest in the disposition of his share of the recovery, and a more thoroughgoing notice program is normally appropriate. The *Manual for Complex Litigation* clearly articulates this distinction between the two notices (§1.45), warning, *inter alia*, that it is "a clear abuse of discretion" for the (c)(2) notice to require class members submit proofs of their claims or "opt in" by stating their intentions to submit claims; the *Manual* goes on to suggest that the appropriate procedure "most often" is for "proof[s] of claim to be submitted after a judgment establishing liability."

This Court has "called attention to the impossibility of setting up a rigid formula as to the kind of

notice that must be given; notice required will vary with circumstances and conditions." *Walker* v. *City of Hutchinson,* 352 U.S. 112, 115-116 (1956). Rule 23 similarly appeals to the discretion of the trial court managing a class action by using such open-ended terms in subsection (c)(2) as "the best notice practicable under the circumstances" and, with respect to individual notice, identification "through reasonable effort"; it is also notable that subsection (c)(2) does not prescribe the timing of the mandatory notice. Subsection (d) simply provides for additional notices as "appropriate." Thus—in contrast to the rigid approach of the panel below—the district court must be left free to tailor to the circumstances of each case the form, manner, extent and timing of notice to class members.

Petitioner's brief discusses the applicability of the "reasonable effort" touchstone to the circumstances of this case. While that element of the rule is not applicable to most consumer class actions (since it is normally impossible to identify injured consumers), other factors may call for imaginative exercises of discretion in other cases. For example, the wording and dissemination of either representation or claim notices to purchasers of consumer products should be quite different from those used in dealing with investors, who normally have some level of sophistication and may be presumed to consult the financial pages of their newspapers. Notwithstanding the disdain of the panel opinion for "full-scale campaigns on TV and radio" as some form of hucksterism out of keeping with judicial dignity, a committee of the Judicial Conference of the United States and the Administrative Office of the United

States Courts have conducted an extensive study of the utility of such contemporary media in the real world. See 4 *The Third Branch* No. 6 at p. 5 (1972, published by the Administrative Office). These media are much more effective (and potentially less expensive) means for reaching the mass of consumers than the traditional form of newspaper legal notice. See the description of the experience in certain of the Antibiotics cases in Shapiro, *Processing the Consumer's Claim,* 41 ABA Antitrust L. J. 257, 262-269 (1972).* See also June 26, 1973 circular of the Administrative Office to district judges recommending the use of radio and television; a copy is set forth in Appendix A, *infra.*

Other circumstances unique to particular cases may also warrant varying treatments of notice questions. For example, one district court has accepted the suggestion of the plaintiff class representatives in the *Ampicillin Antitrust Litigation* (D.D.C. Misc. 45-70) that notice under Rule 23(c)(2) be deferred because of the simultaneous pendency of a government injunction suit, which tolls the statute of limitations on private claims and permits (indeed requires, 15 U.S.C. §25) the court to proceed to a prompt judgment of liability in that suit; thus, neither plaintiffs' nor defendants' interests require early notice in the circumstances of that case. And petitioner's brief shows the applicability, on the facts of this particular case, of the general principle expressed in the *Manual for Complex Litigation* that Rule 23's silence "on the cost of preparing and distributing the re-

* This article contains quite detailed suggestions for the mechanics of collecting and processing consumer claims, including the use of data processing techniques.

quired (c)(2) notice" makes this "an appropriate area for the exercise of the court's discretion" (§1.45).[10]

II. THE PANEL OPINION IS PREMISED UPON AN UNDULY RESTRICTIVE APPROACH TO THE DETERMINATION AND DISTRIBUTON OF DAMAGES IN A CLASS ACTION.

The discussion below of the remedial aspects of consumer class actions is characterized more by rhetoric than by analysis—resulting in a categorical conclusion that "the 'fluid recovery' concept and practice [are] illegal, inadmissible * * * and wholly improper" and thus, apparently, that any kind of classwide approach to damages is a "fantastic procedure" that both violates Rule 23 and denies someone (apparently the defendant) due process of law (479 F.2d at 1018). We think that these problems can be considered more constructively in the light of the actual language and purposes of the Rule and a somewhat more precise analysis of the issues.

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[10] The costs of a claim-collection notice after a judgment of liability may be charged to defendants under well established principles, just as an award of litigation expenses and attorneys' fees to plaintiff's counsel is proper at that time; *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-390 (1970). Where necessary, defendants may also be required to finance notice at the outset by analogy, *inter alia*, to cases permitting awards of attorneys' fees even before any factual adjudication of liability. *E.g.*, *Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 344 (5 Cir. 1972), aff'd on other issues, 409 U.S. 1036 (1973); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9 Cir. 1972). While a preliminary factual hearing with respect to class action issues is, we believe, normally an unwarranted disruption of the progress of the litigation, surely the panel opinion errs in holding that the district court has no *jurisdiction* to conduct such a hearing in the notice context. Moreover, a hearing to assist the court in assessing notice costs after the class action is certified is very different from a hearing with respect to the certification issue itself, which is properly condemned.

The opinion fails to distinguish between two entirely separate matters that are involved in the remedial phase of a (b)(3) class action for damages:[11] *first,* the procedure by which a judgment for damages may be obtained against a defendant, and *second,* the mode of distribution of the damages thus recovered among or on behalf of the members of the plaintiff class. In so doing, it ignores the incontestable principle that the class representative can as a *matter of procedure* obtain a judgment for damages on behalf of the class he represents—incontestable because it is set forth in the literal language of Rule 23(c)(3) that "The judgment in an action maintained as a class action under subdivision (b)(3) * * * shall include * * * those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." Thus, any suggestion that a judgment for damages can embrace only those class members who have come forward is, as Professor Kaplan has explained, a refusal to recognize the supersession of the former "spurious class action" concept with the promulgation of Rule 23(b)(3). Kaplan, *op cit. supra,* 81 Harv. L. Rev. at 396-398. Simply put, the representative can both sue and obtain a judgment on behalf of those he represents, thereby—at least tentatively—separating the defendant from the damages he is proved to have caused

[11] As petitioner's brief notes, these matters may alternatively be treated entirely in equity (Br. 51-52). We do not elaborate on that approach here.

to the as yet unidentified plaintiff class members.[12] We fail to find anything in the *substantive* language of § 4 of the Clayton Act that precludes such a *procedure*; a "person * * * injured in his business or property" is no less a person because his name is unknown, and the damages are no less "actual" because they have been proved by a representative rather than a collection of individuals.

It is only at the second stage, when the damage judgment must be distributed among its proper beneficiaries, that the "fluid recovery" concept as properly understood comes into play, and then as only one among a number of alternative approaches available to the district court. At this point Rule 23 steps out of the picture as a literal roadmap and leaves the court to the equitable devices that inhere in the class action and, for that matter, in any civil action under modern principles.

The first step after the entry of the damage judgment is, of course, the location of as many individual class members as possible and the collection, verification and payment of their claims. We have already discussed some aspects of the notice program to be used for this purpose—which is quite properly a solicitation of claimants by the court and the class representative as its delegate. At this stage there is, on analysis, no difference between a consumer fund created by a litigated judgment and a consumer fund

[12] The amount of injury to a consumer class as a whole may often be much easier to prove than the amount of injury to a particular member, since the total amount of a manufacturer's sales can readily be determined from its business records and the overcharge resulting from an antitrust violation can then be determined by the techniques of proof developed in more conventional antitrust litigation.

created by settlement.[13] The experience of the *Antibiotics* cases shows that the claims of large numbers of consumers to an antitrust damage fund can be collected, verified and paid with reasonable efficiency and a high degree of accuracy. *State of Alabama* v. *Chas. Pfizer & Co.,* 1973 Trade Cases ¶74,343 (SDNY 1972); Shapiro, *Processing the Consumer's Claim,* 41 ABA Antitrust L.J. 257, 262-270 (1972).[14]

If the claimants who step forward do not exhaust the damage judgment entered on behalf of their class, then and only then does a question arise as to the disposition of the excess. One approach is the "fluid class recovery," by which the excess is used for the future benefit of members of the same class—typically by reducing future charges by the defendant for goods or services of the same type as are involved in the suit; the substantial body of authority in sup-

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[13] The argument that a defendant has a "right" to contest his liability to each and every class member is simply another way of claiming that the class representative cannot obtain a judgment for damages on behalf of the class he represents. The defendant has, strictly speaking, no interest in challenging particular claims unless there is some risk that he will be charged with an aggregation of claims exceeding the total classwide damages proved by the representative. The only real interests in this second phase are the interests of the class members in a fair distribution *inter sese* and the interest of the court in avoiding a fraud on the judicial system by spurious claimants. See generally *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278 (SDNY 1971).

[14] This article goes on to show how it would be possible, if necessary, to litigate consumer damages on an individual basis even if a classwide damage judgment could not be obtained, using techniques such as depositions upon written interrogatories and statistical proof that are becoming increasingly commonplace. 41 ABA Antitrust L. J. at 270-273.

port of this approach is thoroughly reviewed in petitioner's brief (at pp. 43-52). Another somewhat different approach is the "cy pres" concept approved in certain of the *Antibiotics* cases, under which the excess recovery on account of pharmaceutical purchases will be used not to reduce future prices but rather to fund public health projects under State supervision. *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d at 1091; Orders dated August 24, 1973 in SDNY No. M19-93; see Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. Chi. L. Rev. 448 (1972). In *Antibiotics* there was no transference of funds from the defendants to some entity other than the class members injured by the violation; rather, the claim-solicitation notice notified class members that those who did not file timely claims would be deemed to have assigned any recovery attributable to them to the States for public use. The court of appeals approved this "Book-of-the-Month-Club" procedure as fair and equitable, 440 F.2d at 1091, and the different panel of the same court in *Eisen* has not explained how such a procedure has become "fantastic" and "illegal" in the interim. Surely, such creativity is not beyond the powers of a court of equity, and the *Manual for Complex Litigation* properly recommends such a procedure—without regard to whether the damage fund is created by settlement or litigation—as "within the otherwise broad discretion granted to the court by Rule 23" (§ 1.45).

The only suggestion of authority for the antipathy below to any kind of classwide judgment or utilization of funds is a citation to *Snyder* v. *Harris,* 394

U.S. 332 (1969), for the broad principle that "the claims of many may not be treated collectively or as 'the class as a whole'" (479 F.2d at 1014). We do not so read that decision, which held no more than that Rule 23 had not repealed the monetary limitations upon federal diversity *jurisdiction* long established under 28 U.S.C. §1332.[15] We cannot believe that the Court thereby intended, *sub silentio,* to confine the federal courts' *remedial* powers in the exercise of their jurisdiction to entertain antitrust claims without regard to any jurisdictional amount, especially in view of the special remedial mandate of the Clayton Act reflected in such decisions of this Court as *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946); *Hanover Shoe Co.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968); and *Perma Life Mufflers* v. *International Parts Corp.,* 392 U.S. 134, 138-139 (1968).

CONCLUSION

This Court's opinion seventy years ago in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 351 (1904), noted that

> "Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified."

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[15] *Zahn* v. *International Paper Co.,* decided December 17, 1973, takes exactly the same approach and similarly has no impact on the present issues.

So it is with the suggestions of financial ruin and "legalized blackmail" to which the panel below succumbed.

The judgment of the court of appeals should be reversed.

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APPENDIX A

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

June 26, 1973

TO ALL UNITED STATES DISTRICT JUDGES
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: Class Action Notices

As an alternative to the use of "franked" envelopes or penalty covers for class action mailings, particularly in actions allowed to proceed in forma pauperis, this office has developed an alternative procedure.

Under it, we maintain a list of radio and T.V. stations which volunteer broadcast time on either a public service or a news release basis to disseminate information on class actions. The use of such gratuitious public service time in circulating to the public the fact of the pendency of specific class action cases has been found to be an effective means of giving notice.

The Honorable William H. Becker, Chief Judge, U.S. District Court, Eastern District of Missouri, used notice by news media in a class action concerning constitutionality of voter registration statutes of Missouri. The case was a usual one in which the urgency of the matter made such notice truly the "best notice practicable" under the circumstances for millions of voters.

The list of stations cooperating in this project is available from our General Counsel's Office and may be obtained for any given area upon request. It is by no means exhaustive, but may well be a starting point in finding additional stations willing to cooperate.

/s/ WILLIAM R. SWEENEY
William R. Sweeney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

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December 28, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF

Additional Constitutional and Statutory Provisions Involved

In his specification of the constitutional provisions, statutes and rule involved in this case (Br. 2), plaintiff has omitted the Seventh Amendment to the United States Constitution; the Rules Enabling Act, 28 U.S.C. § 2072; 28 U.S.C. § 2106; and Section 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78s. These provisions are set forth in the Supplemental Appendix to this brief.[1]

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1. "sa" refers to Supplemental Appendix.

Questions Presented for Review

1. Did Rule 23, Federal Rules of Civil Procedure, as amended in 1966, change the substantive law to permit a "fluid class recovery" of money damages to be awarded under the antitrust laws and Securities Exchange Act of 1934 to a class "as a whole" of future purchasers or sellers, many of whom could not have been injured in their business or property or in any other way by defendants?

2. In this *in personam* action for money damages, do due process and Rule 23 require individual notice to the 2,250,000 class members "who can be identified through reasonable effort"?

3. Does the notice program ordered by the District Court for the 6,000,000 class members meet the requirements of due process and Rule 23?

4. May 90% of the cost of notice to such a class in such an action, in the amount of $19,548, be imposed upon defendants when such costs concededly will be unrecoverable if defendants prevail before the jury at trial on the merits?

5. May defendants be compelled to undergo a preliminary trial on the merits before the Court in a jury case in order to determine whether, on the basis of the probability of plaintiff's success on the merits, defendants will be compelled to finance a lawsuit against themselves?

6. Is this case manageable as a class action by any reasonable interpretation of Rule 23?

7. Did the Court of Appeals have jurisdiction?

Counterstatement of the Case

The argument for reversal rests largely upon alarmist mischaracterizations of the nature and effect of the decisions below. A full counterstatement of the case is necessary to reveal how far astray this argument goes in attempting to broaden the impact of this case beyond its own facts and the two scholarly and carefully circumscribed Court of Appeals' decisions.

The Complaint

The complaint[2] in this action, filed on May 2, 1966, alleges that the suit is a class action brought on behalf of all purchasers and sellers of odd-lots on defendant New York Stock Exchange ("the Exchange"). The complaint does not, as plaintiff contends (Br. 8), specify any time during which purchase or sale was required to qualify as a member of the alleged class. The class was subsequently limited by the District Court to purchasers and sellers during the period May 1, 1962 through June 30, 1966. 52 F.R.D. at 261; A210-211.

Defendants Carlisle & Jacquelin and DeCoppet & Doremus, then separate member firms of the Exchange, are alleged in the first two causes of action to have violated Sections 1 and 2 of the Sherman Act by fixing the odd-lot differential[3] and monopolizing odd-lot trading on the Ex-

2. While plaintiff has printed the complaint in the supplemental appendix (A21-26), he has omitted from the first printed page the words "Plaintiff Demands Jury Trial". So that there will be no doubt that this is a jury case, the entire first page of the complaint appears in the Appendix hereto (7-8 sa).

3. The odd-lot buyer pays a fraction of a point more per share and the odd-lot seller receives a fraction of a point less per share than the controlling round-lot price. This fraction is called the "odd-lot differential."

change. In the third cause of action, the Exchange is alleged to have violated Sections 6 and 19 of the Securities Exchange Act of 1934 by failing adequately to regulate the odd-lot differential—which differential, it is further alleged (complaint ¶ 26; A25), is placed within the Exchange's jurisdiction by section 19(b) of the Exchange Act.

The complaint demands (1) treble damages from the odd-lot firms for plaintiff and his alleged class in an amount to be established at trial; (2) a "fund [for the payment of such damages] in an amount equal to treble that portion of the differential collected in the past which has been excessive"; (3) an unspecified amount of damages from the Exchange; (4) an injunction prohibiting any differential which is "excessive"; and (5) attorneys' fees.

Proceedings Below

Upon defendants' motion, the District Court (Tyler, *J.*) by decision dated September 27, 1966 (41 F.R.D. 147; A93) dismissed the action as a class action because (a) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; (b) questions common to the class did not predominate over questions affecting individual members; and (c) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class.

Eisen I

Plaintiff's motion for certification pursuant to 28 U.S.C. § 1292(b) was denied on October 25, 1966. A103. Plaintiff then filed a notice of appeal from the District Court's

decision, and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. The Court of Appeals (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, *J.*) by decision dated December 19, 1966, held that the denial of class action status was appealable under this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as a final order under 28 U.S.C. § 1291 because, in view of the small amount of the individual claim involved, it constituted the "death knell" of the action. (*Eisen I*[4]) 370 F.2d 119; A104. Defendants' motion for rehearing and rehearing *in banc* was denied. A108-109. Defendants then petitioned this Court for certiorari, arguing that review was appropriate because (a) the *Cohen* principle had been misapplied in that plaintiff had not been denied a substantive right; (b) there was no reason to assume plaintiff would not pursue his individual claim, if meritorious, in light of the established availability [under Section 4 of the Clayton Act and the common law] of attorneys' fees not limited by the principal amount of the recovery; and (c) the "death knell" standard would lead to a lack of uniformity and uncertainty in respect to an important federal statute defining the jurisdiction of Courts of Appeals. Certiorari was denied. 386 U.S. 1035 (1967).

Eisen II

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, the Court of Appeals (Medina,

4. This brief from time to time utilizes what have become the common short-form references to the Court of Appeals' decisions in this case: *Eisen I*—370 F.2d 119 (1966), A104; *Eisen II*—391 F.2d 555 (1968), A110; *Eisen III*—479 F.2d 1005 (1973), A346.

Lumbard and Hays, Circuit Judges, per Medina, *J.*, Lumbard, *C.J.*, dissenting) reversed, articulated a number of principles in regard to facts then in the record, expressly retained jurisdiction, and remanded to the District Court for an evidentiary hearing to determine further facts consistent with the Court's opinion. (*Eisen II*) 391 F. 2d 555; A110. The majority never held (as plaintiff asserts, Br. 9) "that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)"—but left that question open for its own later determination in the light of further facts to be found by the District Court and the application of the neutral principles articulated in the Court of Appeals' opinion.[5]

On the question of notice, the Court of Appeals said:

> "Notice, as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> * * * * *
>
> "The task of furnishing notice to the class members *in such a case as this* must rest upon the representative party when he is the plaintiff." 391 F.2d at 568; A129. (emphasis added) (footnote omitted)

5. In *Eisen III*, the Court aptly characterized its action in *Eisen II*: "[o]n that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction. While entertaining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of Amended Rule 23." 479 F.2d at 1007; A348-349.

* * * * *

". . . we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; A131.

* * * * *

". . . if the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." 391 F.2d at 570; A132.

On the question of manageability, the Court of Appeals said:

"Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them.

* * * * *

"If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue.

". . . it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action." 391 F.2d at 567; A126-128 (footnotes omitted).

In conclusion, the Court of Appeals directed:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; A133.

Chief Judge Lumbard filed a dissenting opinion in which he catalogued difficulties that would be inflicted upon the Court in managing the action as a class action and stated, among other things:

> "Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U.Chi.L.Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.
>
> "The appropriate action for this court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." 391 F.2d at 572; A137.

District Court Proceedings under *Eisen II*

After submission of stipulations (A182-195), undisputed affidavits (A169-181), and a hearing at which testimony was taken (A139-163), by opinion and order dated April 7, 1971 (52 F.R.D. 253; A199), the District Court made extensive findings of fact (A200-208) pursuant to the remand instructions of the Court of Appeals. In summary, the District Court found that:

(a) Approximately 6,000,000 "shareholders" (defined as public individuals, institutions, and intermediaries of a great variety, 52 F.R.D. at 256; A200) had odd-lot transactions during the period from May 1962 through June 1966 in stocks listed on the Exchange.

(b) During the period May 1962 through June 1966 the typical buyer or seller of odd lots had approximately five transactions on the Exchange, and the average odd-lot differential per transaction was approximately $5.18.

(c) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May 1962 through June 1966 in stocks listed on the Exchange, the names and addresses of at least one-third, i.e., 2,000,000, can be identified through the use of computer tapes and the names and addresses of approximately two-thirds, or 4,000,000, cannot be identified with "reasonable effort."

(d) Additionally, approximately 250,000 persons investing in odd-lots through a "Monthly Investment Plan" and payroll deduction plans can be identified through the use of computer tapes.

(e) The shareholders who had odd-lot transactions from May 1962 through June 1968 in stocks listed on the Exchange reside in every state in the United States as well as in most non-Communist countries in the world. Approximately 6% reside in foreign countries.

(f) During the relevant period, the Exchange employed an advertising program under which it advertised in 755 domestic newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was $65,000. The approximate cost of the space for

a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is $110,000.

(g) A representative sample of computer tapes from the fourteen largest brokerage firms (consisting of the tapes from four such firms) indicates that 1,967 accounts during the period from mid-1962 through mid-1966 had ten or more odd-lot transactions.

(h) In *Cherner* v. *Transitron Electronic Corporation*, 201 F.Supp. 934 (D.Mass. 1962) the distribution of a settlement fund of $5,300,000 among 33,036 claimants cost $25.47 per person excluding attorneys' fees and $33.80 per person including attorneys' fees.

(i) In *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F.Supp. 710 (S.D.N.Y. 1970) (hereinafter the *Drug Cases*) the distribution of a $37,000,000 settlement fund to the class of approximately 150,000,000 persons located in every state of the Union and Puerto Rico cost approximately $285,000, including $130,000 for the cost of notice in every English and Spanish language newspaper of general circulation published in the United States, $30,000 for a notice of the proposed settlement in the two newspapers of largest circulation in each state, $21,900 for preparation of mailing lists and other general expenses, and $100,000 for the processing of approximately 42,000 individual claims.

(j) The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10¢ per letter including the postage, irrespective of the number of letters to be sent.[6]

Upon such findings, the District Court went on to hold, directly contrary to its initial decision, that the action

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6. This finding was based on a postage rate of 6¢ for a first class letter.

could be maintained as a class action. To do this, the Court adopted the novel theory of a "fluid class recovery" to benefit future odd-lot purchasers and sellers through an adjustment of the odd-lot differential *in futuro*. This concept, the District Court held, would mean that gross damages can "be fairly estimated without having individual claims filed by each class member." 52 F.R.D. at 262; A211. With respect to payment of any possible damages, the Court held:

> "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. * * * I think it appropriate, as plaintiff urges, to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not wholly relevant to the conditions of this case . . ." 52 F.R.D. at 264; A216.

The Court found "that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted." 52 F.R.D. at 265; A217. Even utilizing the "fluid class recovery" concept, the District Court found that the sum "required for paperwork, printing, postage and publication is $500,000 in round numbers." 52 F.R.D. at 263; A214.

Despite finding that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; A201-204), the

District Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a ¼ page notice would be published twice in five newspapers in three cities. 52 F.R.D. at 267-268; A221-224. Thus, less than ½ of 1% of the readily identifiable class members would receive individual notice. The cost of this nominal program was stated to be $21,720, based on the District Court's cost estimates. 52 F.R.D. at 263; A213.

Since plaintiff had stated from the outset that he could not pay the expense of individual notice, the District Court decided to hold a preliminary hearing on the merits to serve as a basis for allocation of the expenses of the notice that the Court thought sufficient. 52 F.R.D. at 270-272; A229-233. The preliminary hearing (or so-called "mini-hearing") was held over defendants' objections expressed both to the District Court and to the Court of Appeals. A296. Both sides submitted documentary evidence and briefs. No witnesses were called. Plaintiff concluded his argument with a plea that he could not pay any more than token notice costs. A273.

The District Court subsequently issued a further opinion (54 F.R.D. 565; A275) concluding that the odd-lot defendants had fixed the differential in 1951, that this was a *per se* violation of the antitrust laws, and that the Exchange was an active participant through its failure to regulate. The District Court found that plaintiff was likely to prevail at trial on the merits and ordered defendants to pay 90% ($19,548) of the notice cost. No consideration was given to the reasonableness of the circumstances or of the

differential, or to the fact that, as its minutes showed (Ex. J at the preliminary hearing), the S.E.C. had advised the parties before the challenged differential went into effect in 1951 that it had no objection to the new rate.

The Preliminary Hearing on Liability and Damages

The District Court based its substantive conclusions on the fact that the Exchange regulated the odd-lot differential through settled practice rather than formal rule. The District Court failed to give effect to the regulatory context in which the differential was determined, including S.E.C. supervision and hearings. Findings 12 and 14, 54 F.R.D. at 572; A280-281.

Defendants had contended at the mini-hearing that under this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and its progeny,[7] and *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the following uncontroverted facts in the record showed plaintiff's claims to be without merit:

> (1) Sections 19(b)(9) and (11) of the Securities Exchange Act, 15 U.S.C. §§ 78s(b)(9) and (11), give the S.E.C. power to order changes in rules *and practices* of the Exchange particularly in respect of the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales, when necessary or appropriate for the protection of investors or to insure fair dealing in securities traded on such exchange or to insure fair administration of such exchange. At 5-6 sa.

7. See also the recent decisions in *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶74,806 (U.S. Sup. Ct., December 3, 1973) and *Gordon* v. *New York Stock Exchange*, CCH Sec. Law Rep. ¶94,235 (S.D.N.Y., December 4, 1973); *Haddad* v. *The Crosby Corp.*, Civ. No. 2454-72 (D.C.D.C. December 14, 1973)

(2) The S.E.C. has concurred that practices are co-equal with rules for purposes of Section 19(b). *In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270, at 293 (1941).

(3) Historically it had been the practice for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S.E.C., and such practice was left undisturbed by the S.E.C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 284, 287-288 (1941).

(4) Between 1950 and 1964 the Exchange had each year advised the S.E.C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange" (Ex. E at the preliminary hearing).

(5) The 1951 increase in the differential here alleged to be a violation of the antitrust laws and the Exchange Act was, with the approval of the Exchange, presented to the S.E.C. by the odd-lot defendants and elicited S.E.C. approval, as shown by the following minutes of the S.E.C.:

> "After due consideration, the Commission took the position, and so advised Mr. Hanrahan [attorney for the odd-lot defendants], that . . . the Commission had no objection to the present proposal for an increase in the odd-lot differential and would

take no action, if the firms of Carlisle & Jacquelin and DeCoppett & Doremus should proceed with such increase." (Ex. J at preliminary hearing)

(6) The question of the 1951 increase in the differential was thereafter presented again by the Midwest Stock Exchange to the S.E.C. and approved by the S.E.C. after a two-day hearing (Ex. Q, Ex. 1, p. 183; Ex. 7, pp. 41-44 at the preliminary hearing).

(7) Formal adoption of the increase by the Exchange was reported to the S.E.C. by the Exchange's letter of August 17, 1951 (Ex. K at the preliminary hearing).

(8) In April 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time.

(9) A cost study undertaken by Price Waterhouse (Ex. A at the preliminary hearing) at the direction of the Exchange and the S.E.C. was completed on June 14, 1966, and found the past profits of the odd-lot defendants to have been reasonable in comparison to similar businesses.

(10) On June 16, 1966 the Exchange amended its rule at the request of the S.E.C. made pursuant to Section 19(b) of the Exchange Act to raise the breakpoint to \$55[8] (Ex. C at the preliminary hearing).

8. As publicly announced, effective July 7, 1972, due to economies recently effected in the manner of handling odd-lot orders, the differential was reduced by amendment of Exchange rule after the prior required notification to the S.E.C. so that all odd-lot trades are presently effected at a uniform ⅛ point. Of course, this change does not benefit the "class" of purchasers and sellers during 1962-1966 which plaintiff claims to represent.

(11) In 1969 the Justice Department approved the merger of the two odd-lot firms, principally on the ground that the odd-lot business was unique and a "natural monopoly." (letter of Richard W. McLaren, September 17, 1969; Ex. D at the preliminary hearing).

Thus, despite clear statutory power over the differential, the S.E.C. ordered no change until 1966—apparently satisfied that the differential it had approved in 1951 was appropriate during that 15-year period.

Defendants also contended that even if there were liability, there could be no provable damages. The damage estimates of the District Court were based not upon any evidence but upon the assumption that because there was in 1966 a reduction in the odd-lot differential to reflect economies, the differential during the 1962-1966 period would have been, absent the allegedly illegal rate-fixing, the differential after the 1966 reduction. 52 F.R.D. at 265; A218-219. Defendants had argued that the record showed that if the differential had not been established by practice, it would have been set by rule of the Exchange (as it was in 1964) or by the S.E.C. exactly at the point at which it was set by the alleged conspirators because both regulatory agencies had determined such level to be reasonable.

The Decision Below (*Eisen III*)

Immediately after the preliminary hearing, defendants moved the Court of Appeals (A291-308) to take up the matter again pursuant to the jurisdiction which that Court had retained in its 1968 decision. (*Eisen II*) By orders dated May 1, 1972 and August 24, 1972, the Court (Me-

dina, Lumbard and Hays, Circuit Judges) granted the motion. A313-314; 327. Prior thereto, and because plaintiff had attacked the jurisdiction retained by the Court of Appeals in *Eisen II*, defendants filed a notice of appeal from the decisions, opinions, and orders of the District Court dated April 7, 1971 and April 4, 1972. A315-316. Plaintiff's motion to dismiss the appeal (A317-321) was denied by the Court's order of June 29, 1972. A322.

After receiving briefs and hearing oral arguments, the Court of Appeals by decision dated May 1, 1973 (479 F.2d 1005; A346) (Medina, Lumbard and Hays, Circuit Judges), reversed the District Court's ruling permitting the action to be prosecuted as a class action, vacated the findings and conclusions of the District Court on the mini-hearing, and dismissed the action as a class action without prejudice to continuation of the action by plaintiff individually. Judge Medina, joined by Judge Lumbard, filed an opinion (479 F.2d 1005; A348) based on the principles set forth in *Eisen II* and well-established precedents of both this Court and other Courts of Appeals. The opinion held, among other things, that:

1. Rule 23 is a procedural device to facilitate judicial disposition of the individual claims of separate members of a class of persons so numerous that joinder of all members is impractical; the rule was not intended to affect substantive rights, nor could it do so under the Rules Enabling Act.

2. Rule 23 cannot alter the principles of substantive law to make permissible a "fluid class recovery" for claims under Section 4 of the Clayton Act and Section 6 of the Exchange Act.

3. In an *in personam* action for money damages, such as this, Rule 23(c)(2) and due process require "individual notice to all members who can be identified through reasonable effort."

4. In a purely adversarial situation, such as this, the plaintiff must pay the expense of giving notice to the members of his class.

5. The mini-hearing on the merits was not authorized by Rule 23 or any other rule, statute or principle and violated defendants' constitutional safeguards.

6. The evidence on remand as to plaintiff's unwillingness to pay for notice, the diversity and dispersion of the class, and the difficulty of processing and distributing any recovery, as compared with the costs of administration, showed the action to be unmanageable as a class action, as had been feared by the majority and forecast by Chief Judge Lumbard in the Court's 1968 opinions.

Judge Hays filed a separate memorandum (479 F.2d at 1020; A374) concurring in the result because he could not accept the District Court's requiring defendants to pay 90% of the cost of notice ($19,548) which could never be recovered if defendants prevailed before the jury at trial on the merits.

Since the argument for reversal misstates and overstates the scope of the Court of Appeals' carefully reasoned and circumscribed decision in *Eisen III*, it is important to know what the Court of Appeals did not hold:

1. *Eisen III* did not hold, as plaintiff contends (Br. 13), that the Court of Appeals had jurisdiction to re-

view the order of the District Court "because all orders sustaining class actions are appealable." The jurisdiction of *Eisen III* was based on two separate and sufficient grounds: retained jurisdiction and a notice of appeal. The Court of Appeals suggested that the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, should be equally applicable to both denials and grants of class action status where, as here, all of the requisites of that doctrine had coalesced to afford the required finality. 374 F.2d at 1007, n.1; A348-349. That is far from holding that all orders sustaining class actions are appealable.[9]

2. *Eisen III* did not hold, as plaintiff contends (Br. 14), that "[i]n virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3) . . . plaintiff must send and pay for individual notice to every class member who can be identified." In *Eisen II*, the Court of Appeals ruled that "in such a case as this" "[t]he task of furnishing notice must rest upon the representative party when he is the plaintiff." 391 F.2d at 568; A129. In the decision below, the Court reiterated the limited nature of this holding (alternatively using the language " 'in this type of case' ", 479 F.2d at 1009; A351), pointing out that this is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Exchange Act and not a shareholder's action or an action against a public utility sending monthly bills to its customers. 479 F.2d at 1009, n.5; A351-352.

9. In accordance with the Court's request in its order granting certiorari, we discuss the Court of Appeals' jurisdiction in more detail at pp. 82-96 *infra*.

In such cases, the question of who pays for whatever notice is required is to be decided on the particular facts before the court. 479 F.2d at 1009, n.5; A351-352. Nor did the Court of Appeals hold that individual notice to every class member who can be identified was required in a (b)(1) or (b)(2) action. The Court merely held that *some form of notice* was required by due process in (b)(1) and (b)(2) actions. 391 F.2d at 564-565; A122.

3. *Eisen III* did not hold, as plaintiff contends (Br. 14), that "[a]ny kind of newspaper notice is 'a farce' . . . due process and Rule 23 require that every class member receive individual notice of the pendency of the action." What the Court of Appeals did hold was that in a case such as this, where ". . . the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class . . ." (479 F.2d at 1016-1017; A367) and "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." 479 F.2d at 1017; A368-369.

The *In Banc* Opinions

On May 14, 1973, plaintiff filed a petition for rehearing by the Court of Appeals containing a suggestion for rehearing *in banc*. See A375. Rehearing was denied. In decisions filed on May 24, 1973, the five member majority

of the active judges voted to deny an *in banc* hearing and expressed confidence that this Court would grant certiorari. 479 F.2d at 1020; A375. The opinion of Judge Oakes dissenting from denial of rehearing *in banc* (479 F.2d at 1021; A378) is liberally quoted throughout plaintiff's brief. Understandably, Judges Oakes' dissenting opinion was written in a short time without the benefit of the consideration and reflection which was available to the panel. It reflects strong concern that the panel's decision in *Eisen III* might adversely affect environmental and consumer actions affecting large numbers of citizens. Analysis of the Court of Appeals' panel decision, however, shows Judge Oakes' concern to be misplaced. See, *e.g.*, pages 100-101, *infra*.

Summary of Argument

Plaintiff bases his plea for reversal on the reiterated claim that defendants are "wrongdoers" who cannot be permitted to retain these "fruits of their violations". *E.g.*, Br. 16. Plaintiff argues that the "fruits of their illegality" (Br. 28) can be recovered only by permitting this action to be maintained as a class action. The fundamental premise for this extraordinary position—that defendants, who who were in fact acting openly and under the scrutiny of the S.E.C. and the Department of Justice, have violated the antitrust laws and the Exchange Act and have damaged the "class" to the tune of $120 million—is false. With the collapse of the premise, the conclusion falls and plaintiffs' arguments are revealed as nothing but efforts to obtain favored judicial treatment for this particular case.

Plaintiff omits any recognition of the cost of his philosophy to the judiciary, the expense to the litigants, and

the sacrifice of the procedural and substantive rights of both defendants and absent class members. All of plaintiff's arguments come down to one simple theme: this action cannot qualify for class action status unless this Court is prepared to tolerate abrogation of the substantive law otherwise applicable—including essential constitutional guaranties, congressional mandates, and long established principles of decisional law. Such changes in substantive law are precluded by the Rules Enabling Act and the decisions of this Court.

The "fluid recovery" concept, which plaintiff has conceded is the only means of making the case manageable, would change the substantive law to permit money damages to be awarded under the antitrust laws and the Exchange Act to a class "as a whole" of unascertainable future purchasers or sellers (which may not even include plaintiff), many of whom could not have been injured in their businesses or property or in any other way by defendants' past conduct.

Similarly, the denial of individual notice "in such a case as this" to the 2,250,000 readily identifiable class members would violate the due process requirement of the Fifth Amendment as interpreted by this Court and the provisions of Rule 23 itself.

Substantive law must also be judicially legislated to provide authorization for the District Court to conduct a preliminary hearing on the merits in a jury case, and on the basis of such a hearing to require unwilling defendants to pay, in abrogation of their Seventh Amendment guarantee to trial by jury, a sum of almost twice the jurisdictional amount (almost $20,000) to finance a lawsuit against themselves.

The federal courts are not the forum in which to legislate the changes in substantive law which plaintiff argues are necessary for him to play the role of "private attorney general". Absent such legislation (including amendment of the Constitution itself), this case, like many other cases decided to date, is admittedly unmanageable under Rule 23 and should be dismissed as a class action. If plaintiff is unwilling to litigate his individual claim, even with the inducement of a reasonable attorneys' fee, that decision is the best evidence of the fact that this case is nothing but a manufactured claim designed to obtain an *in terrorem* settlement upon which to base a sizeable award of attorneys' fees.

The decisions and orders of the District Court in 1971 and 1972 adopted plaintiff's philosophy and thus constituted a final order under the *Cohen* doctrine. They denied defendants and class members important substantive rights which could never be redressed should the action then go forward without review. For that reason, the Court of Appeals in *Eisen III* had jurisdiction as a result of defendants' notice of appeal. If the "death knell" decision of *Eisen I* was correct, the Court of Appeals also had jurisdiction in *Eisen III* through its inherent power to retain that jurisdiction in its *Eisen II* decision.

ARGUMENT

I

Rule 23 is a procedural device that cannot alter substantive rights.

The primary change effected by the 1966 amendments to Rule 23 was replacement of the so-called "spurious class action" under the old rule, which was only a permissive joinder device, with a procedure whereby the binding effect of the litigation in *in personam* money damage cases would extend to all class members, rather than being limited to those who intervened in the action. Advisory Committee Note, 39 F.R.D. 98-99; 10-11 sa.[10] The rule was drafted, as it had to be, within the confines of substantive law. The congressional grant of authority to this Court to promulgate rules governing procedures expressly provided that:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." Rules Enabling Act, 28 U.S.C. § 2072; 2 sa.

The Court of Appeals in *Eisen II* stated that the "liberal interpretation", which it directed, was to be applied to "all factors enumerated on the face of the rule itself". 391 F.2d at 563; A119. Such an application recognizes that Rule 23 is a procedural rule and that under the Rules Enabling Act the Rule could not have been intended to alter substantive

10. The entire Advisory Committee Note to Rule 23 is reprinted in the Appendix hereto. 9 sa, et seq.

law. If the Rule were construed to permit alteration of substantive rights, the Rule as so applied would be invalid under the Rules Enabling Act. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Sibbach* v. *Wilson and Company*, 312 U.S. 1 (1940). Accord: *Zahn* v. *International Paper Co.*, — U.S. — (December 17, 1973). Thus, the Court of Appeals in *Eisen III* correctly began with the proposition that it was construing a procedural rule designed to achieve economy and uniformity of decision, and a rule which could not change the substantive law, enlarge existing remedies, or sweep away established procedural safeguards. 479 F.2d at 1013-1014; A361.

From the face of Rule 23(b)(3), it is clear that the Rule is a procedural device for bringing together in one forum existing claims of actual individual plaintiffs to achieve economies and uniformity of decision where that can be done without sacrificing procedural fairness or bringing about other undesirable results. The Rule in no way suggests that the class "as a whole" has a right to recover money damages. Nor that the proper notice which is the right of any person who will later be bound by the litigation can be omitted under any circumstances. Nor does the Rule suggest that its purpose is to punish alleged wrongdoers.

For maintenance of an action under Rule 23(b)(3), the Rule[11] requires that the prerequisites of Rule 23(a) as well as Rule 23(b)(3) be met.

Rule 23(a) requires that: the class be so numerous that joinder is impractical; there are common questions of law or fact; the claims or defenses of the representative parties

11. The complete text of Rule 23 is set forth in plaintiff's brief at pages 2-5.

are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) requires the court to find that common questions of law or fact predominate over questions affecting individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In so determining, the Rule directs the court to consider such things as the interest of class members in individually controlling the prosecution or defense; the extent of any litigation already commenced; the desirability of concentrating the claims in the particular forum; and the difficulties likely to be encountered in management of a class action.

The neutral, procedural purpose of the Rule is clear from the Advisory Committee's Note:

> "*Subdivision (b)(3).* In the situations to which this subdivision relates, class-action treatment is not as clearly called for as those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, *supra* at 201." 39 F.R.D. at 102-103; 18-19 sa.

The intent of the Advisory Committee is reflected in the comments of Professor Benjamin Kaplan, who at the time of the drafting of the Rule was the Reporter to the

Committee and subsequently became a member of the Committee:

> "The object [of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 Harv.L.Rev. 356, 390 (1967).

Plaintiff suggests repeatedly (*e.g.* Br. 29, 44, 45, 50, 51) that because the class action procedure originated on the equity side of the courts, as opposed to the law side, there results some implicit authority in Rule 23 to change substantive law to permit an action to be maintained as a class action. This suggestion is, of course, without basis. In the cases which plaintiff cites to support this suggestion, *Smith* v. *Swormsted*, 57 U.S. 288 (1853), *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and *Montgomery Ward & Co., Inc.* v. *Langer*, 168 F.2d 182 (8th Cir. 1948), it could not be clearer that the Courts viewed the class action solely as a procedural device to achieve economy and convenience by permitting parties to sue or be sued representatively where the requirements of substantive law were complied with. In *Hansberry* v. *Lee*, the Court said:

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. . . ." 311 U.S. at 41.

Montgomery Ward & Co., Inc. v. *Langer* merely quotes *Hansberry's* reference to "an invention of equity" and adds that the invention was "mothered by the practical necessity of providing a procedural device . . ." 168 F.2d at 187.

Plaintiff's invocation of "equity" as authority to change substantive law is erroneous. The truth is that because the class suit is "an invention of equity" Rule 23 should never be used to infringe on any person's substantive rights or constitutional guarantees.

II

Neither the antitrust laws nor the Exchange Act authorizes an award of damages to a class "as a whole" of future purchasers and sellers who have not been injured in their business or property or in any other way by defendants.

After the decision in *Eisen II*, plaintiff advanced an alternative theory of recovery in an effort to avoid the concededly insuperable problems of managing this action as a class action. Plaintiff proposed a reduction of the odd-lot differential *in futuro* to benefit future odd-lot purchasers and sellers as an alternative to money damages for actual injuries allegedly inflicted on members of the class. Plaintiff said:

> "There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable."
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> * * * * *
>
> "We acknowledge that the class is not manageable in the narrow sense that it would be imprac-

ticable to compute and award damages to each odd-lot user in the period 1962-66." A196-197.

* * * * *

"Indeed, in practicality, we recognize that it would be impossible for each member of the class to spend hours or days combing his ancient files in order to recover—at best—ten or twenty dollars. Therefore, we proposed that after the amount of the damage is established, the defendants then be ordered to reduce their odd-lot differential until the damage is repaid. Notice, therefore, would not be sent to the 2,000,000 people whose names and addresses have now become ascertainable. Instead, notice could be given to the present class of odd-lot users by the various ways suggested above." A198.

Such an *in futuro* recovery had not been asked for in the complaint. See A26. There was no evidence in the record that odd-lot purchasers and sellers during the period May 1, 1962 to June 30, 1966, or even plaintiff himself, would be among those future (presumably after trial, judgment and appeal) purchasers and sellers who would be the class "as a whole" benefited by the proposed court-ordered reduction in the differential. Nevertheless, the District Court adopted plaintiff's suggestion and called it a "fluid class recovery". As to this decision of the District Court, a Committee of the American College of Trial Lawyers has said:

> ". . . the temptation to subvert substantive law comes in this instance not from policy concerns but rather from expediency." American College of Trial Lawyers Report and Recommendation of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure, at p. 18 (March 15, 1972).

Such a scheme would award recoveries to persons not injured—those who had no odd-lot transaction during the 1962-66 period, but who will trade in the future. The "fluid recovery" scheme would permit some persons allegedly injured by the challenged acts (those who had a few 1962-1966 transactions but many during the future period of reduction) to recoup more than treble the amount of damages actually sustained by them. For those reasons "fluid recovery" goes beyond the remedies provided by Congress in Section 4 of the Clayton Act and the principles articulated by all decisions discussing recovery under Section 6 of the Exchange Act, the two statutes pleaded in the complaint (A21-26) as the bases for jurisdiction and the claims for relief asserted. "Fluid recovery" would also intrude upon the exclusive jurisdiction of the S.E.C. under Section 19(b) of the Exchange Act to order changes in the odd-lot differential fixed by the Exchange.

As a matter of fact, the proposed "fluid recovery" would not even be effective to carry out the plaintiff's proclaimed purpose of equitably redistributing the defendants' "ill-gotten gains." By reason of the great diversity of types of orders and transactions in odd-lots over the years, and the extraordinary variety of entities having odd-lot transactions (A36-62, A98-9), "redistribution" on the basis suggested by plaintiff would not be equitable unless each future customer entered the same type of order for his future transactions as he did in the past.

A. The District Court's decisions are impermissible under the antitrust laws.

The right to recover treble damages is a statutory one, not one at common law. Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> "*Any person who shall be injured in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover three-fold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee." (emphasis added)

The recovery of treble damages, and injunctive relief to avoid *future injury* (Section 16 of the Clayton Act, 15 U.S.C. § 26), are the only remedies given a private citizen. No remedy is provided by which past wrongs can be righted by future rate adjustments. "[P]enalties which are not authorized by law may not be inflicted by judicial authority . . ." *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 77 (1911). In the leading case of *Geddes* v. *Anaconda Copper Mining Company*, 254 U.S. 590 (1921), this Court said (at p. 593): "[i]t is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained."

Plaintiff cannot sue under Section 4 for the benefit of parties who have not been injured in their business or property by defendants' alleged violations. Recovery is allowed only to those who prove actual damage. This is plain and

unmistakable from the language of Section 4 and has been so understood by the courts, including this Court, from the earliest decisions. See *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906), in which the Court of Appeals said of the predecessor statute to Section 4 of the Clayton Act:

> "The seventh section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the 'damages by him sustained', costs of suit, and his recoverable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the Act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action . . ." 127 Fed. at 28-29.

See also *Winckler & Smith Citrus Products Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n.1 (9th Cir. 1965); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Turner Glass Corp.* v. *Hartford-Empire Co.*, 173 F.2d 49 (7th Cir. 1940); *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945); *Electric Theater Co.* v. *Twentieth-Century Fox Film Corp.*, 113 F.Supp. 937, 942 (W.D. Mo. 1953); *Wolf Sales Co.* v. *Rudolph Wurlitzer Co.*, 105

F.Supp. 506 (D.Colo. 1952); *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F.Supp. 15 (S.D.N.Y. 1951).

The word "damages" in Section 4 of the Clayton Act has never been construed to mean anything other than money damages for those who prove they were injured in their business or property. Reduction of the odd-lot differential would not compensate those who no longer trade; it would provide a windfall for many who could not possibly claim any injury. Had Congress intended to permit the extraordinary recovery in antitrust actions which plaintiff advocates, it would have so provided. See *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), in which the Court stated:

> "In enacting these [antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their *actual* damages every time they were injured in their business or property by an antitrust violation." 405 U.S. at 262. (emphasis added)
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> * * * * *
>
> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Note 14 at 263.

Addressing himself to the effort to legislate by judicial decision a recovery under the antitrust laws for persons not

injured, Professor Milton Handler, a respected commentator,[12] has written:

> "The only category of person who may recover damages is one who has been 'injured in his business or property by reason of' a violation. The amount of his recovery, except for costs, is limited to 'threefold the damages *by him* sustained.' The language which Congress used in this statute could not be plainer. It leaves no room for awarding damages to some amorphous 'fluid class' rather than to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class." Handler, "Twenty-fourth Annual Antitrust Review," 26 Record of the Association of the Bar of the City of New York 753, 771-72 (December, 1971).

Professor Handler points out the error in the assumption that "the class" can recover damages, "without having individual claims filed by each class member" (*Eisen*, 52 F.R.D. at 262; A211):

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12. Plaintiff's disparagement (Br. 44, n. 25) of Professor Handler as a "partisan . . . senior member of a law firm . . . actively representing numerous antitrust defendants . . ." is inappropriate. Volume 73 of the Columbia Law Review, No. 3 (March 1973), was dedicated to Professor Handler on the occasion of his retirement after forty-five years of distinguished service on the faculty of the law school. The resolution of the Faculty of Law (pp. 401-403) recites in detail Professor Handler's credentials "as a scholar, a teacher, a practicing lawyer and a public official." (at p. 401) As a practicing lawyer, Professor Handler has represented not only antitrust defendants, but also plaintiffs, with equal vigor, *e.g., Ohio Valley Electric Corporation* v. *General Electric Company*, 244 F.Supp. 914 (S.D.N.Y. 1965) (the "Electrical Equipment Cases").

> "The 'fluid class' concept thus has no relation to the nature and purpose of Rule 23. The 'class' for which the rule provides is merely a procedural device for the joint adjudication of common questions; it is not a legal entity which may recover damages in its own right. The necessity for individual proof of damages cannot therefore be obviated by awarding a recovery to the class 'as a whole.' The class as a whole has no right to recover anything. Only individual persons who have been actually injured may have such a right. By the same token, membership in a class entitles a party to nothing more than the possibility of having his own, individual damage claim adjudicated in a common proceeding; it does not confer upon him any right to receive a windfall recovery on account of damages suffered by someone else. Neither does he acquire any such right because that other person happens to also be a party to the same proceedings by virtue of some representative plaintiff's class action allegations." Handler, *supra* at page 772.

Nor can a "fluid class recovery" be reconciled with *Snyder* v. *Harris*, 394 U.S. 332 (1969). With respect to the amendment of Rule 23, this Court said:

> "Any change in the Rules that did purport to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .'" 394 U.S. at 337.

Accord: *Zahn* v. *International Paper Co.*, — U.S. — (December 17, 1973).

This Court in *Snyder* v. *Harris* considered and rejected the same policy arguments plaintiff now makes to the ef-

fect that liberal interpretation of Rule 23 requires class action status. This Court said:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute [28 U.S.C. § 1332] in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." 394 U.S. at 341-342.

Section 4 of the Clayton Act, like 28 U.S.C. § 1332, is "an important congressional statute" governing jurisdiction of the federal courts. See, *e.g. Cream Top Creamery* v. *Dean Milk*, 383 F.2d 358, 363 (6th Cir. 1967); *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 35 (8th Cir. 1964); *Hall* v. *E.I. DuPont DeNemours & Co.*, 312 F.Supp. 358, 359-360 (E.D.N.Y. 1970).

The Court of Appeals for the Third Circuit, in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972), in rejecting the "deathknell" theory of finality for purposes of appeal from denial of class action status, also rejected the argument that ". . . the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as § 4 of the Clayton Act". The Court said:

> "The decision in Snyder v. Harris, *supra*, would seem to indicate that the Court had a much more

> limited goal in mind when it promulgated the revised Rule 23. Allowing the aggregation of claims would have been more consistent with such an intention." 455 F.2d at 623, n. 7.

The Court of Appeals for the Ninth Circuit in *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908 (1973), refused to permit the State of California to sue as *parens patriae* to recover antitrust injuries allegedly suffered by its citizens. The Court commented critically on the novel theories which have been advanced under Rule 23 and are designed to provide "equivalency recovery". (Compare: "a fund equivalent to the amount of unclaimed damages", *Eisen*, 52 F.R.D. at 265; A217) As to these theories, the Court of Appeals said in *Frito-Lay:*

> "To a greater or lesser degree these theories attempt to utilize class action principles without the class action safeguards so carefully worked out by the drafters." 474 F.2d at 777, n. 11.

Contrary to the District Court's assertion (52 F.R.D. at 264; A217), there is no "respectable precedent" for "fluid class recovery". The three cases cited by Judge Tyler as "respectable precedent" are, as *Eisen III* held (479 F.2d at 1012; A357-358), distinguishable and do not support a "fluid class recovery" in this case.

Bebchick v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963), was neither a class action nor an antitrust action, but rather involved review of a rate determination by a regulatory agency which reached the courts through review of the agency's rate making as provided

by statute; neither the names nor addresses of any injured parties could be determined.

The *Drug Cases* (*State of West Virginia* v. *Chas. Pfizer & Co., Inc.*), 314 F.Supp. 710 (S.D.N.Y. 1970), involved the distribution of a fund created by a settlement of the action which included as an agreed term the method of distribution and had as its objective total peace in regard to all possible claimants; there was no judgment against defendants for the total damages sustained by the class. Judicial approval of the formula and method adopted by the parties, including the ficticious "assignment theory", does not empower the judiciary to force that method on unwilling litigants.

Daar v. *Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (1967), did not arise under Federal Rule 23, nor the anti-trust laws, nor the Exchange Act, and the California Court had already held that each class member would have to come forward at an appropriate time and prove his individual damages. 67 Cal.2d at 706; 433 P.2d at 740. Thus, *Daar*, which was subsequently settled, holds that although a court appearance by class members was not necessary to recover full damages, the filing and proving of individual claims would be and is necessary. This view is supported by *Vasquez* v. *Superior Court of San Joaquin County*, 4 Cal.3rd 800, 484 P.2d 964 (1971), in which *Daar* was referred to as follows:

> "*Daar* makes it clear that although ultimately each class member will be required in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action." 484 P.2d at 973. (footnote omitted)

Other cases cited anew in plaintiff's brief to this Court are equally inapposite or distinguishable.[13]

Plaintiff cites (Br. 46-47, n. 26) *In Re Western Liquid Asphalt Cases*, 1973 CCH Trade Cases ¶ 74,733 (9 Cir. 1973), apparently to support the proposition "that the class alone is in a position to make sure that the defendants do not 'retain the fruits of their illegality.'" First, the *Western Liquid Asphalt Cases* are not and have never been class actions. Secondly, plaintiff has quoted, out of context, a portion of that case which, if taken in its entirety, supports defendants' position that the fluid recovery theory is contrary to Section 4 of the Clayton Act. As supportive of the position that the District Court had the power to create a "fluid class recovery" under the antitrust laws, plaintiff argues in footnote 26 (Br. 46-47) that courts "are able to fashion relief to the end that 'there be no hiatus in the enforcement' of the antitrust law." However, if that partial quotation is placed in context, it becomes very clear that the Court of Appeals for the Ninth Circuit was supporting defendants' contention that no one can recover under Section 4 of the Clayton Act who cannot demonstrate injury in his business or property:

> "The antitrust laws are to be construed so as to achieve the broad goals which Congress intended to effectuate. [citation omitted] One such policy goal is

13. Plaintiff's quotation (Br. 44) of one line from the Chief Justice's "Report on the Federal Judicial Branch—1973," 59 A.B.A.J. 1125, 1128 (October 1973), is equally misplaced. The thrust of the Report was how properly to deal with the increasing caseload of the courts. Adoption of plaintiff's fluid class recovery concept can only exacerbate that problem by generating a flood of mass consumer class actions in the federal courts, while "[t]he problem is really one for solution by the Congress". 479 F.2d at 1019; A373.

> *that there be no hiatus in the enforcement of* these laws. Each individual who is injured may sue. [citation omitted] Thus, while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, neither should we bar recovery to those who can demonstrate that they bore the burden of the violation". (at p. 95,220) (emphasis added to indicate source of plaintiff's quotation)

Prior to the second statement from the *Asphalt* cases which plaintiff quotes ("to permit so large a fish to escape the nets is unthinkable"), the Court of Appeals specifically distinguished the *Western Liquid Asphalt Cases* from mass consumer class actions such as *Eisen*:

> "*We do not have a case of consumers who have only a miniscule interest in the outcome of the litigation.* Instead, appellants are a large number of public consumers of liquid asphalt, who allege that illegal overcharges by appellees resulted in unlawfully high prices to them, for about three million tons of asphalt purchased in some 37,000 contracts. To permit so large a fish to escape the nets is unthinkable". (at p. 95,219) (emphasis added)

Plaintiff cites several other cases (Br. 48) as supporting the proposition that:

> ". . . a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted."

The cases do not support that proposition. In *Alaska Steamship Co.* v. *Federal Maritime Commission*, 344 F.2d

810 (9th Cir. 1965), no fund was involved, but the Federal Maritime Commission directed a future reduction of an excessive rate over which it had regulatory jurisdiction. In *Olson* v. *The County of Sacramento*, 79 Cal.Rep. 140 (Cal. Ct. App., 3d Dist. 1969), *Metro Homes, Inc.* v. *City of Warren*, 19 Mich. App. 664 (1969), *leave to appeal denied*, 383 Mich. 761, *cert. denied*, 398 U.S. 959 (1970); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) [cited at Br. 44], and *SEC* v. *Golconda Mining Co.*, 327 F.Supp. 257 (S.D.N.Y. 1971) [cited at Br. 46], there was no future reduction of charges involved, but only the distribution of accumulated funds to those injured, a procedure which is conceded by all parties to be unmanageable in this case.[14]

Market Street Railroad Co. v. *Railroad Commission*, 28 Cal.2d 363, 171 P.2d 875 (1946), which is also cited by plaintiff (Br. 48), was not a class action. The case involved an order by the Railroad Commission to reduce fares, to return excess charges to anyone who made a claim, and to turn over the unclaimed fares to the City since it had subsequently acquired the railway. This Court has held that antitrust damages may not be so treated. *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972).

Plaintiff's analogy between shareholder derivative suits and his fluid class recovery scheme (Br. 49) is inapposite. To the extent that shares are transferred during the litigation, the price of the shares to the purchaser reflects the prospects of a potentially advantageous litigation. Thus, the new owner pays for his expectancy and the old owner

14. The same distinction applies to *Dickinson* v. *Burnham*, 147 F. 2d 473 (2d Cir. 1952), cited (p. 5) in the *Amicus* brief of State of California.

is recompensed for his damage. There is no federal statute or decision which awards a recovery to anyone not injured.

The principle of the "fluid class recovery" was specifically rejected in *City of Philadelphia* v. *American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971)[15], after review of the District Court decisions in both *Eisen* and the *Antibiotic Antitrust Actions*.

> "It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." 53 F.R.D. at 72.

Replying to the argument oft-heard in the instant case that in the absence of a class action defendants will be able to keep "illegal" gains, the Court went on to say that the solution to that problem must come from amendment of the antitrust laws and was not to be found in Rule 23:

> "Although this Court recognizes the importance of private antitrust actions to help enforce the antitrust laws, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L.Ed. 2d 1231 (1968), it is not believed that Rule 23 was intended to permit a redress for all wrongs committed under the antitrust laws.
>
> * * * * *
>
> "This is not to say that guilty conspirators should not be compelled to disgorge their ill-gotten gains.

15. *See also, Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 491 (N.D.Ill. 1969); *Brennan* v. *Midwestern United Life* 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Kronen-Ins. Co.*, 259 F.Supp. 673, 684 (N.D.Ind. 1966), *aff'd*, 450 F.2d *berg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42, 45 (S.D.N.Y. 1966); 3B Moore's Federal Practice ¶ 23.45[2], p. 758, N. 29 (2d Ed. 1969).

> The solution of the problem, however, lies not in imposing an increased burden on the federal courts over and above that which may or should normally be expected of judges in the discharge of their judicial duties, but rather in having the antitrust laws or rules amended to alleviate the problem of manageability inherent in class actions wherein millions of members of the consuming public are involved." 53 F.R.D. at 73-74.

Had Congress intended to require defendants found guilty of violating the antitrust laws to give up every penny of illegal gain, it could have done so by requiring them to account for illegal profits. Compare the accounting remedy in patent and trademark actions, 35 U.S.C. § 284 and 15 U.S.C. § 1117. However, as Professor Handler points out:

> "Thus far, that body has wisely refrained from imposing any such needlessly draconian penalty. But if Congress were to pass such a law, at least it would be Congress which would determine what to do with the funds which were collected. Under our political system, it is hardly appropriate to vest the judiciary with discretion as to how monies should best be spent in the public interest." Handler, *supra*, at page 774.

And, in this case, the public was amply protected by the S.E.C. which, with full knowledge beforehand, specifically approved the odd-lot differential here attacked as illegal.

B. Section 16 of the Clayton Act provides no authority for a "fluid class recovery".

Plaintiff argues (Br. 51-52) that there is authority for a "fluid recovery" because the complaint contains a prayer for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, and injunctive relief is an equitable remedy. The argument cannot survive analysis.

The injunctive relief prayed for in the complaint is a judgment:

> "D. Enjoining Carlisle & Jacquelin and DeCoppet & Doremus from any further violations of the Sherman Antitrust Act, §§ 1 and 2, and from collecting any further excessive differentials." A26.

Section 16 of the Clayton Act authorizes injunctive relief to prevent

> ". . . threatened loss or damage by a violation of the anti-trust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate . . ." (text of Section 16 is reprinted at Pl. Br. 57-58).

The problems with plaintiff's argument are obvious. He has not requested a "fluid recovery" in his complaint. The differential of the 1962-66 period has been changed twice under S.E.C. supervision, in 1966 pursuant to a Section 19 (b) request. (Ex. C at the preliminary hearing) The possibility of defendants Carlisle & Jacquelin and DeCoppet & Doremus violating Sections 1 or 2 of the Sherman Act was removed when these two firms merged in 1969 with the consent of the Department of Justice. (Letter dated September 17, 1969 to Hamer Budge, S.E.C. Chairman, from Richard W. McLaren, Assistant Attorney General, defendant's Exhibit D at the preliminary hearing). In short, the prayer for injunctive relief pleaded in the complaint has long been moot.

Furthermore, the provisions of Section 16 of the Clayton Act are not applicable to the "restitution of illegal exactions" (Pl. Br. 52), as plaintiff calls his "fluid recovery." Such restitutions, of course, would not constitute "threatened loss or damage".

Plaintiff attempts to analogize his "fluid recovery" theory to a restitution order and relies on an Emergency Price Control Act case, *Porter* v. *Warren Holding Co.*, 328 U.S. 395 (1946) (action by Administrator to compel return of rent overcharges to those individuals who paid them). Plaintiff fails to cite a single case allowing any money recovery, fluid or otherwise, under Section 16 of the Clayton Act. He rests his contention on an alleged principle of equity, in disregard of this Court's specific instruction that Section 16

> ". . . does not go further in terms than to give an injunction to private persons against threatened loss." *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29 (1916).

This Court's interpretation of Section 16 was strictly adhered to in *Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928), where the Court, relying on *Fleitmann*, held that:

> "The right to equitable relief against threatened loss provided by section 16 cannot be interpreted broadly enough to authorize the court, as incidental to its injunction, to award treble damages for past violations of the antitrust laws." 23 F.2d at 428.

C. The "fluid class recovery" is contrary to the requirements for recovery under Section 6 of the Exchange Act.

Recovery is sought against the Exchange in the third cause of action for the alleged failure of the Exchange to fulfill its regulatory duty under Sections 6 and 19(a) of the Securities Exchange Act of 1934. In his brief to this Court (Br. 49), plaintiff attempts to effect a *de facto* amendment of his complaint by arguing that the "[l]iability of the Exchange is predicated on federal common law . . .". Compare paragraphs 21 and 27 of the complaint (A24-25):

> "21. That this third cause of action arises under the Securities Exchange Act of 1934, §§ 6(b), 6(d), and 19(a), 15 U.S.C. §§ 78f(b), 78f(d), and 78s(a)."
>
> * * * * *
>
> "27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff."

There is no private right of action provided in either Section 6 or 19(a) of the Exchange Act. However, the Court of Appeals for the Second Circuit in *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), held that Congress had intended there be a private action based on Section 6 of the Exchange Act to enforce the statutory duties imposed upon exchanges.

In *Baird*, the Court ruled that recovery could not be awarded because plaintiffs had failed to show damages

resulting from the Exchange's inaction. It is clear both from the majority opinion of the Court in *Baird* v. *Franklin* and Judge Clark's dissenting opinion that recovery under Section 6 must must be compensatory and is only obtainable upon a showing of injury.

> "Granted a right of action in plaintiffs, then, the final question is as to damages and whether the Exchange's breach of duty was a proximate cause of plaintiffs' losses." 141 F.2d at 245.

The principles of the *Baird* decision have been followed in all succeeding decisions on Section 6 liability. See, *e.g.*, *Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), *cert. denied*, 391 U.S. 913 (1969) and *Pettit* v. *American Stock Exchange*, 217 F.Supp. 21 (S.D.N.Y. 1963).

Plaintiff cites *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to support the position that "federal courts may use any available remedy to make good the wrong done." However, the remedy requested by plaintiff is not "available" under Section 6 of the Exchange Act, which has been interpreted to allow damages only to those injured (see *Baird* v. *Franklin*, *supra*). The fact that plaintiff brings this suit on behalf of a class under procedural Rule 23 cannot effect a change in the substantive legal principles under Section 6 of the Exchange Act. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

Neither *Borak* nor *Bivens* involved an attempt to obtain substantive change through interpretation of a procedural rule. It is generally accepted that where the court does

imply a private remedy under a statute "it is acting to further the general purpose which it finds *in the legislation* . . ." RESTATEMENT (SECOND) OF TORTS § 286, comment d (1965). (emphasis added) Plaintiff is asking this Court not to interpret legislation, but to change long recognized principles of substantive law merely to permit plaintiff to maintain this action as a class action under Rule 23.

D. The proposed "fluid class recovery" intrudes upon the exclusive jurisdiction of the Securities and Exchange Commission.

The "fluid class recovery" proposed by plaintiff and adopted by the District Court would require reduction of the odd-lot differential *in futuro*. However, under Sections 19(b)(9) and (11) of the Exchange Act the S.E.C. has exclusive jurisdiction over Exchange rules and practices fixing "reasonable rates of commission, interest, listing, and other charges" and relating to "odd-lot purchases and sales", subject only to review by a United States Court of Appeals. 15 U.S.C. §§ 78(s)(b)(9), (11); § 78(y). See also Section 11(b) of the Exchange Act, 15 U.S.C. § 78k(b), dealing with S.E.C. and exchange regulation of odd-lot trading.

As of July 1, 1966, the S.E.C., acting pursuant to its authority under Section 19(b)(9), requested the Exchange to enact through its rules specific new limits for the odd-lot differential and the Exchange did so. (See Ex. C at the preliminary hearing.) The Exchange's further 1972 reduction in the differential (see Note 8, *supra* at p. 15) was prefiled with the S.E.C. as required under its Rule 17a-8, 17 CFR § 240.17a-8.

An S.E.C. order fixing rates of commission under the Exchange Act may be reviewed only by a Court of Appeals under Section 25(a) of the Act, 15 U.S.C. § 78(y). That section provides the exclusive method of judicial review for S.E.C. orders under that Act. *Securities and Exchange Commission* v. *Andrews*, 88 F.2d 441, 442 (2d Cir. 1937); *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F.2d 236, 241 (D.C. Cir. 1937). Section 25(a) specifically recognizes the expertise of the S.E.C. by providing that its findings of fact are conclusive if supported by substantial evidence. Accordingly, it is plain that Congress did not intend that the judiciary should be free to interfere with the S.E.C.'s exercise of its statutory powers over the odd-lot differential. This was an important consideration to the Court of Appeals in *Eisen III* in disapproving a "fluid class recovery." 479 F.2d 1011; A355-356. It is a consideration with which plaintiff does not deal.

In *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217 (S.D.N.Y.), *aff'd* 466 F.2d 743 (2d Cir. 1972), the Court declined to enjoin the Exchange from expelling a member firm for violation of the Exchange's rule on institutional membership. One reason for the Court's reluctance to interfere was that the S.E.C. had indicated its approval of the Exchange's enforcement of the rule and had indicated that it was planning to suggest new rules having, in relevant part, the same effect as the Exchange's rule. The Court then said:

> "This Court considers that the rule making power of the SEC as granted to it by § 6d of the 1934 Act, and § 19b(9) (10) and (13) thereof, empower the SEC to effectuate the establishment of reasonable

> rules covering the underlying problem of the access by institutional investors to the national exchanges as members, or parents of member firms. . . . This Court concludes that there is adequate power in the SEC to take all steps necessary with respect to the access of institutional investors to the NYSE and further believes that this Court should take no step in private litigation which might in any way prejudice the effectiveness of such a scheme, or create any grandfather rights for plaintiffs, or otherwise impair by implication or other, the full and complete right and power of the SEC to do the regulatory work for which it was constituted, in an area of market action which cries out for some rational plan." 346 F.Supp. at 228.

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court gave classic expression to the long-established principles of judicial restraint in such cases:

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." at 574-575.

See also *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶ 74,806 (U.S. Sup. Ct. December 3, 1973) and *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973).

Following this Court's instruction in *Far East Conference*, the United States District Court for the Southern District of New York on December 12, 1973 refused a mandatory injunction to compel the Exchange to disclose the names of member firms in financial difficulty. *Investors Protective Association* v. *New York Stock Exchange*, 73 Civ. 2823 (S.D.N.Y. 1973). The Court noted that if the plaintiff wished to influence or change Exchange rules or policy, his remedy was under Section 19(b) of the Exchange Act and the Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(c), with review available under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. The Court said:

> "The *Far East* rule has been applied in this circuit in cases in which direct court review of plaintiffs' claims would have interfered with the operation of the SEC's regulatory authority under the Exchange Act. *United Gas Corp.* v. *Pennzoil Co.*, 248 F.Supp. 449, 454 (S.D.N.Y. 1965), *aff'd*, 354 F.2d 1002 (2d Cir. 1965); *Kroese* v. *New York Stock Exchange*, 227 F.Supp. 519, 521 (S.D.N.Y. 1964); see also, *Robert W. Stark, Jr. Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217, 228 (S.D.N.Y.), *aff'd*, 446 F.2d 743 (2d Cir. 1972)."

It is no answer to comment, as the District Court here did (52 F.R.D. at 265; A218), that administration of the "fluid class recovery" "might properly be done under S.E.C. supervision or at least with S.E.C. approval." The point is that the determination of a proper rate should be left to

the S.E.C. subject to review by a Court of Appeals and not determined in a private treble damage action in a District Court. The protection or benefit accorded purchasers and sellers of odd-lots lies in the determination of a proper odd-lot rate, and Congress has entrusted that function to the S.E.C. Thus, plaintiff's "fluid class recovery" theory is not only in conflict with the Exchange Act, but would undercut the scheme of protection for odd-lot investors intended by Congress.

III

The notice prescribed by the District Court does not meet the standards of due process and Rule 23.

In its initial opinion, the District Court correctly held that "both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a 'mere gesture' for those who cannot be identified." 41 F.R.D. at 151; A101. In *Eisen II*, the Court of Appeals agreed. 391 F.2d at 568-570; A129-132.

As a result of the evidentiary hearings directed by *Eisen II*, the District Court found that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; A201-204). Moreover, defendants had stipulated that "[s]uch names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders." (A184-

185).[16] Then, however, despite this finding and stipulation, the Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions and 5,000 additional class members selected at random. The identification of these individuals and their names and addresses would be obtained from the computer tapes. 52 F.R.D. 267; A222-223. Additionally, notice would be sent to member firms of the Exchange and banks with large trust departments,[17] and a one-quarter page notice would be published twice in five newspapers in three cities. 52 F.R.D. at 267-268; A221-223.

The District Court's rationale for its limited notice program was that due process and Rule 23(c)(2) did not

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16. For the first time, plaintiff contends that it is not "reasonable effort" for defendants to turn over the 2,250,000 names and addresses from the computer tapes (Br. 34). No court below so found. Compare finding No. 5 with finding No. 7, 52 F.R.D. at 257; A201-202. Compare plaintiff's readiness to assert that the action is manageable because 56% of the transactions (not merely names and addresses) are on these same computer tapes. (Pl. Br. 43) Compare the reliance placed upon the computer tapes by the District Court's notice program, *infra*, to obtain both names and addresses and frequency of transaction data.

17. The difficulties likely to be encountered as a result of reliance upon commercial banks were discussed by Judge Pollack in *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972):

> ". . . individual notice to the income beneficiaries and remaindermen of the modern day trusts presents enormous problems. Identification of the beneficiaries of a continuing personal trust while possible is often a massive task. Much more is involved than the mere examination of a trust instrument to disclose the names, let alone the locations, of the vested and contingent remaindermen. All these would reasonably be entitled to notice since they are more the interested parties than are the income beneficiaries by reason of the fact that the principal of the trust would probably be charged with the expenses or receive any damages." At 335.

require individual notice to the 2,250,000 identifiable class members "[a]lthough the argument has some merits." 52 F.R.D. at 267; A222. As the Court of Appeals held in *Eisen III* (470 F.2d 1015; A363-364), the District Court's failure to direct notice to all identifiable class members was in conflict with the statement of the Advisory Committee that "[t]his mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject" (39 F.R.D. at 107; 27 sa.), and contravened the Court of Appeals' clear and specific ruling in *Eisen II* that in cases such as this individual notice was required by Rule 23 and due process. 391 F.2d at 568-570; A129-132.

The District Court's error stems from its view that one of the considerations in determining what kind of notice is required by due process and Rule 23(c)(2) is whether "expensive and stringent notice requirements could vitiate the class action device" if the plaintiff is unable to pay the costs of notice. 52 F.R.D. at 266; A221. The District Court here saw its duty as one to insure that this action continued as a class action rather than to insure the due process required by the Constitution and Rule 23. See, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Clearly that was incorrect. Rules Enabling Act, 28 U.S.C. § 2072; *Snyder* v. *Harris*, 394 U.S. 332 (1969).

One need look only so far as the District Court's own outline of the purpose of notice (52 F.R.D. at 226; A219-221) to conclude that the type of notice necessary to meet due process standards has nothing to do with whether the plaintiff is able to pay the costs of such notice. Furthermore, the type of notice cannot be fairly said to depend upon the

size of the claim. It may be that many persons with small claims will not respond to the notice (see 52 F.R.D. at 266; A220), but an individual's right to withdraw from the case, bring his own claim, or seek to play a role in management of the action cannot be dispensed with on the assumption that his claim is so small that he has no interest in responding to notice.

The requirements of due process have been clearly stated by this Court in *Mullane, supra, Schroeder* v. *City of New York*, 371 U.S. 208 (1962), *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), *New York* v. *New York N.H. & H.R. Co.*, 344 U.S. 293 (1953), and many other cases. In *Mullane*, the Court rejected the use of a published notice with respect to persons whose names and addresses were available, not on the grounds of any potential adverse interest (Pl. Br. 32), but for the following reasons stated by the Court:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> * * * * *
>
> ". . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 314-15.

And further:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318.

The Court reaffirmed its *Mullane* holding in *Schroeder* v. *City of New York:*

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. . . . '[N]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and . . . '[i]ts justification is difficult at best'." 371 U.S. at 212-213.

See also *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), where the Court said:

> ". . . [W]here the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form [publication] . . . is ineffectual for any purpose." at 727.

Finally, Rule 23(c)(2) provides that class members are entitled to "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." It is clear from the words of the rule that where identification presents no problem, individual notice is required. The District Court simply ignored the availability of the names and addresses of 2,250,000 class members.[18]

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18. Compare, e.g., *Katz* v. *Carte Blanche Corp.*, 53 F.R.D. 539 (M.D. Pa. 1971) (Truth in Lending Act case; notice by mail ordered to some 600,000 class members whose names and addresses were available from defendants' records); *Buford* v. *American Finance Co.*, 333 F.Supp. 1243 (1971) (Truth in Lending Act; notice by mail would be required to those class members whose names and addresses were available from defendants'

The Court of Appeals in *Eisen II* had cautioned that ". . . we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; A131. Nevertheless, the publication program outlined by the District Court was "ritualistic" because as a practical matter most class members would never see it. The combined circulation of the five newspapers in which the District Court would order publication of notice is only 3,905,297. 52 F.R.D. at 274; A236. The Court justified its publication program on the ground that a large portion of shareholders in public corporations reside in New York and California. There were 4,947,000 shareholders in New York and California, but there were 15,173,000 shareholders elsewhere. 52 F.R.D. at 273; A234-235. Presumably, the distribution of odd-lot purchasers and sellers is comparable. Therefore, there is no chance that the notice could be seen by almost three-fourths of the members of the class. As the Court of Appeals held in *Eisen III*, notice by publication to such a dispersed and unidentifiable class is "a farce" (479 F.2d

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records); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) (security fraud; individual notice by mail given to class members who were identifiable from available records); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969) (security fraud; five related class actions; notice by mail ordered in four of the actions; notice by publication in the fifth only because the class members could not be identified); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969) (antitrust class action on behalf of several classes of public libraries, school districts, and boards of education; notice by mail required); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968) (antitrust class action on behalf of various governmental entities and agencies; notice by mail given); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966) (security fraud; notice by mail to each security holder); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F.Supp. 673 (N.D. Ind. 1966), *aff'd*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (security fraud; notice by mail ordered).

at 1017; A368-369), or, in the words of the District Court, a "mere gesture". 41 F.R.D. at 151; A101.

Plaintiff suggests (Br. 30-31), citing *Hansberry* v. *Lee*, 311 U.S. 32 (1940), that if there is adequate representation in a class action, due process is met without the individual notice required by such cases as *Mullane* and *Schroeder* and Rule 23 itself. Plaintiff is incorrect. Both the Rule and due process require adequate representation *and* notice, which must be individual when the names and addresses of the parties to be bound in the litigation are reasonably available.

Plaintiff misquotes (Br. 30-31) Judge Oakes as saying that individual notice to identifiable class members is unnecessary. Judge Oakes' statement was limited "to class members *who cannot be identified.*" 479 F.2d at 1024; A383. In addition, as *Eisen III* held, under the circumstances of this case notice by publication would not be consistent with due process.

Plaintiff contends (Br. 31-32) that it is unnecessary to give the individual notice required by Rule 23 and due process because the statute of limitations has run. The suggestion ignores considerable authority indicating that the pendency of a class action tolls the statute of limitations. See *State of Utah* v. *American Pipe & Construction Co.*, 473 F.2d 580 (9th Cir. 1972), *cert. granted*, 411 U.S. 963 (1973); *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec.L.Rep. ¶ 93,489 (S.D. Iowa 1972) (cited by plaintiff at Br. 39); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521 (S.D.N.Y. 1971); and *Philadelphia Electric Company* v. *Anaconda American Brass Company*, 43 F.R.D. 452, 461 (E.D. Pa 1968). Further-

more, many alleged class members may wish to assist in determining the course of the action, and others may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious. These members are entitled to such options, and Rule 23 provides them through the requirement of notice.

This opportunity to participate and have a real voice in the strategy and management of a litigation in which he will be bound cannot be denied a class member, whether his claim be small, or whether the running of the statute of limitations has effectively left him no other forum.[19] Because of the failure to send individual notice to those class members whose names and addresses were ascertainable, the Court of Appeals for the Third Circuit in *Greenfield* v. *Villagers Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), citing *Eisen III* and the decisions of this Court on notice discussed above, reversed the District Court and held void all orders below effectuating a settlement and distribution of a settlement fund, saying:

> "A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class member, *i.e.*, '[T]he best notice practicable under the circumstances including individual notice . . . .'
>
> "Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound by a

19. For this reason alone the Court of Appeals was correct in holding that due process required some form of notice in Rule 23(b)(1) and (2) actions, although not necessarily individual notice. 391 F.2d at 564; A122.

> final judgment, and that interested parties normally have a real voice in the strategy and management of the litigation, the procedure can be tolerated, if not completely justified, only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice.
>
> * * * * *
>
> "Where names and addresses of members of the class are easily ascertainable, requirements of due process would dictate that the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,' Rule 23(c)(2), would be individual notice." 483 F.2d at 831-832. (footnote omitted)

Plaintiff argues (Br. 35-38) that the Court of Appeals in *Eisen III* improperly failed to consider alternatives "for the purpose of satisfying notice requirements". One alternative plaintiff suggests is division of the class into subclasses. However, the complaint defined the class which plaintiff sought to represent, and plaintiff never advocated subclasses before the District Court. It is not for courts of appeal to recast a plaintiff's pleading.

Another alternative plaintiff suggests (Br. 36) is to call the action a Rule 23(b)(1) or (2) action through the stage of determination of liability, and then, if the defendants are found liable, convert the action into a Rule 23(b)(3) action. That would not work.

In *Eisen II*, the Court of Appeals correctly held (391 F.2d at 564; A121): (a) there was no danger of inconsistent or varying adjudications because, as plaintiff had argued, it would be too expensive for different class members to

bring separate suits (thus precluding a Rule 23(b)(1) action); and (b) this action was not an action predominantly or exclusively brought for injunctive or declaratory relief (thus negating a Rule 23(b)(2) action). See Advisory Committee's Note, 39 F.R.D. at 102; 17-18 sa. Money damages are what this suit is all about. The prayer for injunctive relief became moot in 1966 when the S.E.C. directed its 19(b) request to the Exchange to institute a new odd-lot differential. Ex. C at the preliminary hearing; see *Eisen III*, 479 F.2d 1011, n.10; A356.

Another problem with plaintiff's scheme is that if defendants are found not liable and no notice has been given to absent class members, defendants would have attained a hollow victory indeed because no one would be bound but Mr. Eisen. Rule 23(c)(3). In such a circumstance, defendants would have been put to untold expense[20] to litigate a $70 claim which plaintiff advises would not have been brought but as a class action; yet defendants would never be able to secure the *res judicata* advantages which Rule 23 provides for a defendant who is forced to suffer a massive class action and who prevails.[21] The end result would be the same as the one-way intervention which was so highly criticized under the old Rule and which the amendments

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20. Defendants' taxable costs on the *Eisen III* appeal alone were $11,596.74 (A389-390), and that is only the tip of the iceberg resulting from over seven years of litigation. See A328-345.

21. Contrary to the Brief *Amicus Curiae* of the American Civil Liberties Union (at 6-10), such perversion of the Rule is more than adequate to give defendants "standing" to object. Defendants' attorneys also have such "standing" as officers of the Court, which is charged by Rule 23 with protection of the rights of absent class members. The need for *res judicata* effect of a decision on liability favorable to defendants is not considered either by plaintiff or the Briefs *Amicus Curiae* of Public Citizen and Consumers Union of United States, Inc., at 7-18, and the State of Alabama, *et al*, at 14-21.

were expressly intended to change. See *Richland* v. *Cheatham*, 272 F.Supp. 148, 155-156 (S.D.N.Y. 1967); Advisory Committee Note, 39 F.R.D. at 105; 24 sa.

IV

Defendants' Fifth and Seventh Amendment rights were violated and the substantive law misapplied as a result of the District Court's preliminary hearing.

A. Requiring defendants to pay the cost of notice was improper.

The Court of Appeals in *Eisen II* ruled in no uncertain terms that

> "The task of furnishing notice to the class members *in such a case as this must* rest upon the representative party when he is plaintiff." 391 F.2d at 568; A129. (footnote omitted; emphasis added)[22]

The Court's ruling was consistent with the Revisers' intention for procedure under Rule 23. Professor Kaplan, Reporter to the Advisory Committee on Civil Rules, has stated:

> "It may be presumed that, when the method of notification has been decided upon, plaintiffs ordinarily will be asked to attend to the mechanics of publication and distribution and will initially bear the expense." *Continuing Work of the Civil Committee: 1966 Amendments to FRCP*(1), 81 Harv. L. Rev. 356, 398 n.157 (1967)

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22. Accord, *Akron* v. *Laub Baking Co.*, 1972 Trade Cases ¶ 73,930, at p. 91,889 (N.D. Ohio 1972); *Buford* v. *American Finance Co., supra*, 333 F.Supp. at 1250, 1252; *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 317 F.Supp. 1022, 1025 (E.D. Pa. 1970); *Richland* v. *Cheatham*, 272 F.Supp. 148, 156 (S.D.N.Y. 1967); 3B Moore's Federal Practice, ¶ 23.55 at p. 23-1154.

Notwithstanding the Court of Appeals' clear ruling, the District Court's opinion of April 4, 1972 imposed 90% of the costs of Rule 23(c)(2) notice ($19,548) on defendants. In *Eisen III*, the Court of Appeals adhered to the principle that "in this type of case" the representative plaintiff must bear the first cost of notice. 479 F.2d at 1009; A351. The Court pointed out that this was a suit to recover money damages under Section 4 of the Clayton Act and Section 6 of the Exchange Act—not a shareholder's derivative action or one seeking a refund against a public utility corporation where notice could be given in the customer's next monthly statement. The Court was careful to state that there may be

> ". . . other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration." *Id.*, n. 5.

Many of the briefs *amici* overlook this careful limitation in the Court of Appeals decision.

In a case such as this, forcing defendants to finance a lawsuit against themselves (on behalf of people who have shown no wish to sue) is a matter of substance, which cannot be authorized by any procedural rule.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held that the requirement of a cost bond was substantive and not procedural.

> "However, it creates a new liability where none existed before, for it makes a stockholder who in-

> stitutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as 'costs'. If all the Act did was to create this liability, it would clearly be substantive. But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." at 555-556.

There is absolutely no authority under Section 4 of the Clayton Act or Section 6 of the Exchange Act for assessing defendants with the cost of notice to a class which plaintiff purports to represent adequately. In *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), attorneys' fees were awarded only after liability had been determined. The Court was careful to limit such awards to cases "of this type [a suit by shareholders to set aside a merger]." 396 U.S. at 390.

In *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 317 F.Supp. 1022 (E.D. Pa. 1970), the Court stated:

> "There is another difficulty as well. In one of the memoranda submitted to us for consideration on this motion, the plaintiff seems to intimate that he is only prepared to contribute approximately $300.00 to pay for notice to the other members of the class he seeks to represent. Regardless of which form of

> notice we ultimately decide is mandated by Rule 23 under the circumstances of this case, it is clear that such notice will cost substantially more than $300.00. At the same time we have concluded that in a case such as this, the expense of furnishing at least the initial notice to class members must fall on the representative party when he is the plaintiff. *Eisen, supra*, 391 F.2d 555 at 568; Richland v. Cheatham, 272 F.Supp. 148 (S.D.N.Y. 1967); Herbst v. Able, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); cf. 3B Moore's Federal Practice, ¶ 23.55 and cases there cited. ('Logically the mechanical and financial burden of giving the notice required by (c)(2) should be borne by the plaintiff as a concomitant of maintaining his class action.') Therefore it is clear that the plaintiff will have to provide substantially more financial support to the case than he now seems willing to offer if he is to be able to adequately represent his class." 317 F.Supp. at 1025. (footnotes omitted)

The *Cusick* Court noted the difference in terms of fairness between imposing the burden of notice on the corporate defendant in a shareholders' derivative suit and imposing that burden on a truly adversarial defendant:

> "The cases cited by the plaintiff in this regard, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Bragalini v. Biblowitz (S.D.N.Y. 1969) and Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) [the same cases relied upon by Judge Tyler; 52 F.R.D. at 269, n.14; A227] are all class actions brought by shareholders of a corporation against the corporation, and therefore clearly distinguishable from cases such as the one before us. In suits brought by shareholders, it may be reasonable to impose the duty of notice on the corporation be-

cause the corporation has a fiduciary duty to its shareholders who after all own the corporation and because, as a practical matter, the corporation makes frequent mailings to shareholders and can easily insert notice of a case pending against it brought in the name of the shareholders. As the Court stated in Berland, 48 F.R.D. at 132:

> "'. . . Where the claim appears to be a meritorious one and defendants desire it be prosecuted through a class action, it does not seem unreasonable to require the corporate defendant to share the cost of notice, particularly in a case where plaintiffs may be able to reimburse the corporation if the claim is dismissed.'
>
> On the other hand, where as here the plaintiffs are numerous, unidentified and have no relations to the defendant other than the purchase of a manufactured good, the imposition cost [sic] of notice on the defendant at an early stage of the case would be highly unfair and raise serious questions of due process." 317 F.Supp. at 1025, n.6.

Because plaintiff had always claimed that he could not pay any more than token costs (A273), it seems plain that should defendants eventually prevail on the merits before a jury, which has been demanded in this action (7 sa), they would never recover the substantial amount of money they were ordered to pay by the District Court.[23] The District Court's order thus amounts to a clear taking of defendants' property in substantial value and in violation of their rights to trial by jury under the Seventh Amendment and to due process under the Fifth Amendment. This alone

23. The $19,548 assessment upon defendants is almost twice the jurisdictional amount required by 28 U.S.C. §§ 1331 and 1332.

was enough for Judge Hays to vote for reversal. 479 F.2d at 1020; A374.

The cases cited by plaintiff (Br. 40) do not support assessment of the cost of notice on defendants.

In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court regarded the issue on a replevin bond as whether "procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another." 407 U.S. at 80. The deprivation of property permitted by the state statutes was "temporary" and "non-final" (*id.* at 84-5), unlike the deprivation here.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the Court held that Wisconsin's pre-judgment garnishment of wages procedure, which contained no provisions for notice and prior hearing, constituted a violation of due process. The majority did not specify the type of notice or prior hearing it believed would satisfy the requirements of the Fourteenth Amendment. A debtor in Wisconsin who was subject to garnishment could recover his wages after success at trial. Here defendants can never recover the costs of notice should they ultimately prevail on the merits.

In *Farmer* v. *American Arabian Oil Co.*, 285 F.2d 720 (2d Cir. 1960), the Court reversed an order under local Rule 2(b) of the Southern and Eastern Districts of New York requiring an out-of-state plaintiff to file a bond for costs on retrial because the defendant had sought the bond ". . . apparently as a belated trial tactic, four years and four months after action brought". 285 F.2d at 721.

Plaintiff's analogy (Br. 40-41) to the cost of discovery or defense is inapposite. Those costs are traditional and consistent with the adversarial process of litigation—totally different from being required to finance a lawsuit against one's self. What is plain here is that someone, as plaintiff, who warrants that he can adequately represent the class, should also be able to communicate with those he seeks to represent. Put differently, if the class plaintiff seeks to represent is one too large for him to communicate with, then he is not adequate to represent that class. Rule 23(a)(4).

B. The Court of Appeals' disapproval of the preliminary hearing was in accord with the Federal Rules and was necessary to preserve defendants' substantive rights.

Rule 23 does not authorize a preliminary hearing on the merits to determine who is to pay for notice. Such a hearing subverts Rule 23's direction for prompt class action determination and subverts the procedures prescribed by other Federal rules, such as Rules 12 and 56, and the discovery rules. It also subverts defendants' right to trial by jury under the Seventh Amendment.

The Court of Appeals said in *Eisen III*:

> "But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and

> conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable."
>
> * * * * *
>
> ". . . No provision is made in amended Rule 23 for any such mini, preliminary or other hearings on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that 'as soon as practicable after the commencement of the action' the question of class suit *vel non* be decided." 479 F.2d at 1015-1016; A365-367.

The decision below followed the decision of the Fifth Circuit Court of Appeals in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). No other Court of Appeals decision is in conflict. See *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972). In *Miller*, Judge Wisdom held that the mere possibility that the District Court may have considered the merits on a Rule 23 determination was sufficient reason for reversal:

> "This portion of the order indicates to us that in passing on the propriety of the class action the district judge may have considered whether the petition stated a cause of action or whether Miller would succeed on the merits. This was improper. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the

merits, but rather whether the requirements of Rule 23 are met.

"The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action.

* * * * *

" . . . the Advisory Committee Notes make clear that a district judge is to consider only the specific requirements of sub-divisions (a) and (b) of Rule 23. The Committee stated with respect to sub-division (c) (1) of Rule 23:

" 'In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. *The determination depends in each case on satisfaction of the terms of sub-division (a) and the relevant provisions of sub-division (b).*' " 452 F.2d at 427-428.

See also *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec. Law Rep. ¶ 93,489 (S.D. Iowa 1972) (also cited by plaintiff at Br. 39), refusing a preliminary hearing on the merits and discussing (at pp. 92,370-92,372) the problems and lack of safeguards inherent in such a hearing.

Plaintiff contends (Br. 40, n.18) that the Court of Appeals for the Fifth Circuit modified its proscription of preliminary hearings on the merits in *Huff* v. *N.D. Cass Company of Alabama*, 17 F.R.Serv.2d 934 (5th Cir. 1973), which was an *in banc* decision. Plaintiff completely misconstrues the Court of Appeals' holding in *Huff* by char-

acterizing that opinion as allowing preliminary hearings *on the merits.*

In *Huff*, the District Court conducted a preliminary evidentiary hearing which led to an appraisal of the merits of plaintiff's individual claim, determined that plaintiff was not a member of the class, and, therefore, could not adequately protect its interests as required by Rule 23(a)(4). The Court of Appeals' ruling on the preliminary hearing stated that "this court is committed to the principle that the standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim". 17 F.R.Serv.2d at 935, citing *Miller* v. *Mackey*, *supra*. The Court went on to hold that in looking into the *merits* of plaintiff's claim, "the trial court applied an incorrect standard, and its decision must be vacated and the cause remanded for consideration under the correct standard." *id.* The type of inquiry that the Court recognized as proper in the *Huff* case was one relating solely to whether plaintiff meets the requirements of Rule 23(a) and (b) and not one which would assess the likelihood of success on the merits.

C. The District Court misapplied the substantive law.

The Court of Appeals in *Eisen III* vacated the District Court's substantive findings and conclusions at the preliminary hearing (479 F.2d at 1020; A374) and recognized that defendants had advanced cogent arguments for a finding that there was no merit to plaintiff's claims. 479 F.2d at 1012; A359.

The District Court had based its substantive conclusions (54 F.R.D. at 572; A286) on the fact that the Exchange reg-

ulated the differential through settled practice rather than formal rule. Defendants contend that in arriving at these conclusions, the District Court either ignored or misapplied the principles set forth in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Kaplan* v. *Lehman Brothers*, 250 F.Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir. 1967), *cert. denied*, 389 U.S. 954 (1967); *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953); and *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 727 (1944) in respect to the facts that were placed in the record by defendants at the preliminary hearing. These facts are summarized *supra* at pp. 13-16.

1. ***A per se concept is inapplicable.***

The District Court ruled that plaintiff was likely to carry his burden of showing that defendants "fixed" the differential and that "[u]nder the *per se* rule, once this showing has been made, judgment must follow and the Court need not consider any defenses such as . . . reasonableness . . ." 54 F.R.D. at 571; A284. The District Court moved to judgment too abruptly. Under *Silver*, the determination of the odd-lot differential as required by the Exchange Act cannot be subject to attack under the antitrust laws; even if it were, the rule of reason must be applied.

In *Silver*, *supra*, this Court stated that "[t]he general dimensions of the duty of self-regulation are suggested by § 19(b) of the [Exchange] Act . . ." 373 U.S. at 352-353. Section 19(b)(9) of the Act includes "the fixing of reasonable rates of commission, interest, listing and other

charges" as within the Exchange's duty of self-regulation and § 19(b)(11) places "odd-lot purchases and sales" within such duty. The Court in *Silver* recognized that there was a head-on collision between the Exchange Act and the antitrust laws and considered how that collision should be reconciled.

While acknowledging in *Silver* the S.E.C.'s power to disapprove any rules or practices of a national securities exchange (*Id.* at 357), the Court observed that the S.E.C. did not have jurisdiction " . . to review particular instances of enforcement of exchange rules." *Id.* at 357. It thus ruled that the case presented no conflict between the S.E.C.'s regulatory power and the antitrust laws. The Court stated that a different case for antitrust exemption would be presented "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws . . ." (*Id.* at 360) and that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." *Id.* at 361. See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶ 74,806 (U.S. Sup. Ct., December 3, 1973); and *Haddad* v. *The Crosby Corp.*, Civ. No. 2454-72 (D.C. D.C. December 14, 1973).

The Court of Appeals for the Seventh Circuit in *Kaplan* v. *Lehman Brothers*, *supra*, following the teachings of *Silver*, held that the Exchange's practice of fixing minimum

rates of commission could not be a violation of the antitrust laws because § 19(b)(9) of the Exchange Act empowered the Exchange to fix "reasonable rates of commission," subject to review by the S.E.C.

In its subsequent decision in *Thill Securities Corp.* v. *New York Stock Exchange, supra*, the Seventh Circuit reaffirmed its decision in *Kaplan*, and pointed out that plaintiff Thill was not proceeding on a *per se* theory but was claiming that application of the Exchange's rules against sharing of commissions violated the rule of reason (433 F.2d at 270).

In *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217 (S.D.N.Y.), *aff'd* 466 F.2d 743 (2d Cir. 1972), the Court found little merit in the claim that the Exchange's rule precluding institutional membership violated the antitrust laws. The Court said:

> "Reasonable rules which fulfill the need for self-regulation of the exchange are *required*. 15 U.S.C. § 78f(b). Since they are an essential part of the statutory scheme, they may, if reasonable and relevant, and fairly administered, be within an implied exception to the antitrust statutes. *Silver* v. *N.Y.S.E.*, 373 U.S. 341 (1963)." at 228.

On December 4, 1973, the United States District Court for the Southern District of New York applied the *Silver* rationale to defeat an antitrust attack on the Exchange's commission rate structure. *Gordon* v. *New York Stock Exchange, Inc.*, CCH Sec. Law Rep. ¶ 94,235 (S.D.N.Y. Dec. 4, 1973). The Court ruled:

> "We hold that this court lacks jurisdiction to entertain an anti-trust attack on the commission

structure of the Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act. Since the Act expressly directs the SEC to supervise the 'fixing of reasonable rates of commission' (§ 19(b)(9)), we believe this is the 'different case,' on which *Silver* reserved decision, where review of exchange self-regulation is available 'through a vehicle other than the antitrust laws' (*Silver*, p. 360)." at p. 94, 955.

* * * * *

"Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the antitrust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws." at pp. 94, 957-58.

Here Sections 6 and 19(b) of the Exchange Act obligate the Exchange to exercise its self-regulatory duty to adopt rules or practices governing the differential. The fact that regulation of the odd-lot business and the differential is required by the Exchange Act was confirmed by the S.E.C.'s exercise of its Section 19(b) authority in respect to the multiple trading of odd-lots in 1941 (*In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270) and with respect to the differential in 1966. Section 19(b) expressly includes regulation by both rules "*and practices.*" The District Court

simply ignored the words of the statute when it distinguished between regulation by rule and by practice: ". . . . if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court." 54 F.R.D. at 572; A286.

It is indisputable that the very differential here claimed to be a violation of Section 1 of the Sherman Act was implemented after a presentation by the odd-lot defendants to the S.E.C., after a two-day hearing before the S.E.C. held at the request of the Midwest Stock Exchange, and after the S.E.C. recorded in its minutes (Ex. J. at the preliminary hearing) that it had no objection (see *supra* at 14-15). Similar approvals were obtained from the Exchange (*id.*)

In April 1964, the "practice" was called a "rule", so that for half the period for which damages are claimed here, the "rule" that the District Court said *arguendo* would be beyond its review powers existed *de jure* as well as *de facto*. See 54 F.R.D. at 542; A286, and *supra* at 15.

Thus, both the Exchange and the S.E.C. did regulate the differential as required in Section 19(b) of the Exchange Act. If antitrust liability were to be imposed, there would be a "head-on collision" between the Exchange Act and the antitrust laws, and the Exchange Act could not be made to work as Congress wished. Nor could the Exchange Act work if the district courts were to pre-empt the S.E.C.'s judgment in areas of its basic regulatory function by rendering *ad hoc* decisions on rules and practices of general application, such as the differential.

2. *Rule of reason.*

Even if the practice of having a uniform odd-lot differential cannot be said under *Silver* to be exempt from application of the antitrust laws, the District Court was in error in failing to apply the rule of reason as specified in *Silver* (373 U.S. at 360-361; 361-367) and in *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953, Medina, J.).

As recognized by Section 19(b) of the Exchange Act, there had to be a uniform odd-lot differential on the Exchange for an orderly market. Historically, there has always been only one differential on all national securities exchanges. All Exchange action and the action by the two odd-lot defendants was undertaken with the full knowledge and participation of the S.E.C. The differential here challenged for the period 1962-1966 was found to have been reasonable after investigation by the Exchange's Special Committee on Odd-lots (Ex. F at the preliminary hearing) and the Price Waterhouse cost study undertaken under the joint auspices of the S.E.C. and the Exchange (Ex. A at the preliminary hearing).

In cases presenting similar historical, economic and practical considerations, the rule of reason has been held applicable. *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Morgan*, *supra*, at 689-690.

With the fall of plaintiff's premise that defendants are "wrongdoers" and that he is a "private attorney general" seeking to compel return of the "fruits of their illegality", there also falls plaintiff's rationale for violation of substantive and procedural rights to permit this action to be maintained as a class action.

V

Under the applicable law the action cannot be managed as a class action and should be dismissed as such.

It was understandable that in 1968, in view of the newness of amended Rule 23, the majority of the Court of Appeals were reluctant to conclude that this case could not be managed as a class action without a closer look at the facts. Those facts have now been found by the District Court. They show overwhelmingly that the case cannot be managed as a class action with any reasonable relation between recovery and cost, without even considering the overwhelming drain on court and lawyers' time which such an exercise would entail.

All concur that this action cannot be managed as a class action without the "fluid class recovery" invention. The costs of paper work, printing, and postage computed by the District Court bear out plaintiff's concession that this action cannot be managed to distribute money damages. The process of distributing damages will clearly consume any possible recovery by members who file claims. On 1971 cost figures, the District Court estimated that the costs required for "paperwork, printing, postage and publication is $500,000 in round numbers." 52 F.R.D. at 263; A214. The District Court concluded that there might be a larger number of claims in this case than in the *Drug Cases* in which 42,000 individual claims were filed. Even if as many as 50,000 persons filed claims in this case, the average cost per claim would be $10. In *Cherner* v. *Transitron Electronic Corporation*, 201 F.Supp. 934 (D. Mass. 1962), the cost of administering a settlement fund of $5,300,000 to 33,036

claimants found eligible to participate averaged $25.47 per claim, exclusive of attorney's fees. 52 F.R.D. at 259; A205-206. See Stipulation No. 2. A191-193.

The average damages alleged to have been sustained by each class member in this action can be estimated at between $3.89 and $20.98. During the relevant period, the average odd-lot differential was $5.18 and each odd-lot trader averaged 5 transactions. 52 F.R.D. at 257; A201. Minimum damages estimated by the District Court were 5% of the differential paid. Maximum damages estimated by the District Court were about 3 times the minimum damages, or 15%. However, plaintiff estimated his damages at 27% of the differential paid. 52 F.R.D. at 265 n.8; A218. Thus, $5.18 times 5 times .05 times 3 equals $3.89. 27% of the total differential paid multiplied by 3 equals $20.98.

The average cost for processing individual claims will grow. For example, if the District Court's notice program is inadequate, the cost of notice will be substantially greater. Inflation has already had its effect on costs, for the District Court's estimate of the cost of notice was based on a 6 cent first class mailing cost. The District Court's view that "claims" could be processed for $200,000 was based on the *Drug Cases* (52 F.R.D. at 263; A214), and hence its estimate is probably much too low because in the *Drug Cases* claims were processed by plaintiffs' attorney outside of an adversarial proceeding. Here defendants will have and exercise the right to contest claims. In short, the average cost per claimant will probably be much greater than $10, but the average damages may be as low as $3.89 per claimant.

The mathematics of this case bear out Chief Judge Augelli's view in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 73 (D. N.J. 1971), that "Rule 23 was [not] intended to permit a redress for all wrongs committed under the antitrust laws," and the reluctance of the Court of Appeals in *Eisen II* "to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." 391 F.2d at 567; A126.

Many courts have recognized the inherent impossibility of managing a class action involving millions of persons with small claims scattered over a wide geographic area.[24]

Illinois Bell Telephone Co. v. *Slattery*, 102 F.2d 58 (7th Cir.), *cert. denied*, 307 U.S. 648 (1939), proffered by plaintiff to show that this action can be managed as a class

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24. See *Reinisch* v. *New York Stock Exchange*, 52 F.R.D. 561 (S.D. N.Y. 1971) (rejecting class of all traders on the New York Stock Exchange), *appeal dismissed* (2d Cir. Dk. No. 71-1759, 1971) (not officially reported); *United Egg Producers* v. *Bauer Int'l Corp.*, 311 F.Supp. 1375 (S.D.N.Y. 1970) (rejecting class of all egg consumers in the United States); *Ward* v. *Luttrell*, 292 F.Supp. 165 (E.D. La. 1968) (rejecting class of Louisiana working women); *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972) (rejecting class of "all persons and institutions who are or have been beneficiaries of any trust or trusts of which defendant is trustee and for whose account defendant executes securities transactions" at p. 330); *City of Philadelphia* v. *American Oil Co., supra* (rejecting class of all non-governmental gasoline purchasers in Pennsylvania, Delaware and New Jersey); *Hackett* v. *General Host Corp.*, Civil No. 70-534 (E.D. Pa. 1970) (rejecting class of all consumers of bread in Philadelphia area), *appeal dismissed*, 455 F.2d 618 (3d Cir. 1972), *cert. denied*, 407 U.S. 925 (1972); *State of Hawaii* v. *Standard Oil Co.*, 301 F.Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) (rejecting class of all gasoline purchasers in Hawaii); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 461 (E.D. Pa. 1968). ("The problems of management of a class action embracing as plaintiffs, potentially, all state and local governments in the United States, are so plainly insurmountable as to require no further comment.")

action, actually proves the opposite. As Chief Judge Lumbard pointed out in his dissent in *Eisen II* (391 F.2d at 571; A135), the telephone company " . . . agreed to undertake the task of making refunds and to assume the costs of the distribution." (See also 102 F.2d at 61) It employed as many as 2,000 people at one time, incurred expenses of $2,700,000 to distribute $17,000,000 to only slightly more than one million people, and accumulated 110 tons of records relating to the litigation and refunds. (A193-194) Inflation would have more than doubled the cost of similar efforts today, without even considering, as Chief Judge Lumbard pointed out (319 F.2d at 571; A135), that the company already had set aside the fund, could easily calculate the amounts due, and made frequent mailings to its subscribers.

Plaintiff's use in this case (Br. 43) of the quotation from *Yaffe* v. *Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972), for the proposition that "vaguely-perceived management problems" can be overcome by the flexibility of the court to deal with a class suit, is misleading. In *Yaffe*, the Court of Appeals reviewed the dismissal of a class action which had occurred prior to any discovery having been taken on issues of compliance with the factors enumerated in Rule 23. The Court said:

> "To pronounce finally, prior to allowing any discovery, the non-existence of a class or set of subclasses, when their existence may depend on information wholly within defendant's ken, seems precipitate and contrary to the pragmatic spirit of Rule 23. Evidence which might be forthcoming might well shed light on a final decision on this issue." at 1366.

The *Yaffe case* was in the same posture as this case was when the Court of Appeals decided *Eisen II* in 1968. However, when *Eisen III* was decided in 1973, the discovery and evidence that was not present in *Yaffe* was in the record in this case and supports the determination that this action cannot be maintained as a class action.

VI

The jurisdiction of the Court of Appeals.

The Court's grant of certiorari requested the parties to brief and argue, in addition to the other questions presented, the jurisdiction of the Court of Appeals. In our submission, the Court of Appeals had ample jurisdiction, from whatever aspect the point is viewed, to hear and determine the case as it did on May 1, 1973. Its jurisdiction rested not only on the independent appealability of the District Court's orders below, but also upon its retention of its own jurisdiction in 1968, when it remanded the case to the District Court for a limited purpose only.

A. Appealability as of Right.

The District Court's orders of April 7, 1971 and April 4, 1972 constituted a "final" decision[25] appealable of right under 28 U.S.C. § 1291, for they directed the unprecedented (1) extraction, before trial, from the defendants of funds plaintiff needed to communicate with his own "class",

25. The orders were inextricably linked, because the imposition of notice costs on defendants rested on the prior determination that the suit was a proper class action. 52 F.R.D. at 272; A233. Both the District Court and the Court of Appeals ruled that appeal from the first order should not be heard separately from the second. 52 F.R.D. at 272; A233, A296.

(2) infliction of this unrecoverable penalty upon the basis of a single judge's quick impression of the merits of a difficult antitrust and Exchange Act case, (3) provision of so inadequate a notice to the class, even though obtained at great cost, that defendants could not reasonably expect any protection under *res judicata* if they won, and the rights of absent class members were clearly denied, (4) misconstruction of Section 4 of the Clayton Act as granting recovery not to individuals but to a "class" which included persons not injured in their business or property, and (5) misconstruction of the decisional law for recovery under Section 6 of the Exchange Act to authorize an award of damages to those not injured. It was not only proper but imperative that these matters be set aright, not only for this case but for others awaiting its outcome.

The District Court's orders did not deal with the elements of the underlying antitrust action, except for a tentative preview of the merits to justify summarily depriving defendants of their property. The orders affected matters separable from, and collateral to, the rights asserted in the main action. They were, in the words of this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949):

> ". . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." at 546.

The District Court's rulings raised a separate and fundamental issue: whether the action, otherwise conceded to be unmanageable (A196-197), could be continued as a class action by use of makeshift and unlawful devices. These rul-

ings were in sharp conflict with the directions of the Court of Appeals in *Eisen II*, and they were ripe for review. Indeed, no meaningful later appeal could ever be had of the order that defendants pay $19,548 as an irretrievable contribution to plaintiff's lawsuit, for it was conceded that unless plaintiff won his case before the jury he would be unable to pay it back. No possible subsequent exercise of discretion by the District Court could repair that injury. Later judicial review would be as empty a rite as it would have been in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950), if the ship had sailed without hope of return. Thus, the District Court's orders fell squarely within the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.* and were final for purposes of immediate appeal under 28 U.S.C. § 1291.

It is no answer to suggest, as plaintiff does (Br. 24), that an order of attachment, inadequately bonded, is not appealable. The function of an order of attachment is to preserve property for ultimate adjudication, and the amount of the bond is within the district court's discretion. The effect of the District Court's orders was not to preserve but to destroy permanently the defendants' right to $19,548.

The District Court considered that the exaction from the defendants of the costs of its notice program, to "the extent that this may result in the imposition of a burden on defendants prior to trial," was analogous to a preliminary injunction, 52 F.R.D. at 270; A227. The analogy supports appealability. A preliminary injunction requiring a defendant to make payments, when he could not recover them if the relevant statute [the Agricultural Marketing Agreement Act of 1937] was later held unconstitutional,

was stayed in the Court of Appeals pending review; this Court intervened by writ of certiorari "because important questions of federal law undecided by this Court were involved and pending appeals in other cases with similar issues were ready for argument." *United States* v. *Whiting Milk Co.*, 21 F. Supp. 321 (D. Mass. 1937), *stays continued sub nom. H. P. Hood & Sons, Inc.* v. *United States*, 97 F.2d 677 (1st Cir. 1938), *opinion on merits* 26 F.Supp. 672 (D. Mass 1939), *aff'd.*, 307 U.S. 588, 591 (1939). The analogy provides an unnecessary but additional ground of appeal: orders granting injunctions are appealable of right under 28 U.S.C. § 1292(a)(1). Indeed, the District Court's orders in this case were sufficiently drastic to have permitted review by mandamus—had that been required—which would have presented to the Court of Appeals the whole range of the District Court's rulings. In analogous circumstances in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) (involving mandamus to review the unprecedented direction that a defendant undergo a physical and mental examination)[26], this Court stated:

> "Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context. The meaning of Rule 35's requirements of 'in controversy' and 'good cause' also raised issues of first impression. In our view, the Court of Appeals should have also, under these special circumstances, determined the 'good cause' issue, so as to avoid

26. In *Schlagenhauf*, the Court said that the need for guidelines for construction and application of the Federal Rules of Civil Procedure made it appropriate that the Court rule upon the point, even if it were dealing directly with the District Court rather than with the Court of Appeals. 379 U.S. at 112.

> piecemeal litigation and to settle new and important problems." at 111.

The fundamental policy of judicial economy reflected in 28 U.S.C. § 1291 was not ill-served by the Court of Appeals' reaching the class action question. As stated in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964):

> "It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." at 153.
>
> * * *
>
> "It is true that if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292 (b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." at 154.

Despite sharp differences among the judges of the Second Circuit, expressed in their various opinions on the petition for rehearing *in banc*, they appeared unanimous that (as

Judge Mansfield stated, 479 F. 2d at 1021, A377): "[t]he issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible." No Circuit Judge expressed any doubt that the Court of Appeals had jurisdiction.

Even plaintiff, although challenging jurisdiction (Br. 19-25), has tacitly conceded it. His petition for certiorari (p. 29) alternatively asked this Court to "grant the petition, in order to remand the case for consideration by the Court of Appeals in banc."

B. Retained Jurisdiction.

A separate independent basis for the Court of Appeals' jurisdiction in *Eisen III* was that its earlier opinion in *Eisen II* expressly retained jurisdiction, while remanding to the District Court for further findings to permit a proper review by the Court of Appeals. Plaintiff endorses the Court of Appeals' *Eisen II* jurisdiction (Br. 19-21), but contends that it lost that jurisdiction upon issuance of its 1968 mandate (Br. 20-21). That, we submit, ignores the language of the mandate which:

> ". . . remanded to said District Court for the proceedings in accordance with the opinion of this court. . . ." A138.

Directing the Court below to take evidence required in order to settle points insufficiently clear in the record before it, the Court of Appeals in *Eisen II* had said in its opinion:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions

> of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; A133.

Throughout the Court of Appeals' majority opinion in *Eisen II* runs its determination that it could not effectively review the District Court's decision of September 27, 1966 on the facts found and appraised by the District Court. Its need for further evidence is exemplified at several points. On the issue of requisite notice to the class, the Court stated:

> "On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice . . . Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c) (2); there was also a lack of evidentiary basis for the findings necessary to support rulings . . ."
>
> "Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate . . . ?" 391 F.2d at 569; A130-31.

On the issue of manageability, the Court of Appeals ruled:

> "Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action . . . If as a practical matter

> class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue." 391 F.2d at 567; A127.

In *Eisen III*, the Court of Appeals did what it had said in *Eisen II* it would do:

> "We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of [Rule 23]." 479 F.2d at 1013-14; A361.

Plaintiff's argument that the Court of Appeals' mandate carried away its jurisdiction irretrievably (*e.g.* Br. 16, 20)[27] ignores not only the procedure adopted by the Court of Appeals, but also the broad grant of authority conferred by 28 U.S.C. §2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and

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27. The dicta from two cases cited by plaintiff (Br. 20) miss the point. In neither case did the Court of Appeals purport to retain jurisdiction. In *In re Nevada-Utah Mines & Smelter Corp.*, 204 Fed. 982 (2d Cir. 1913), the Court simply denied a rehearing of the cause, and also declined an application to intervene made in the Circuit Court of Appeals after issuance of its mandate affirming the order of the District Court. The Court indicated it had power to require return of the mandate had it so desired. In *Meredith* v. *Fair*, 306 F.2d 374 (5th Cir. 1962), the Court did not retain jurisdiction. It held that its mandate could not be stayed after issuance, but recalled the mandate to amend and clarify it. The Court's statement that "control over the judgment below comes to an end after the mandate has been issued" meant only that it is too late to stay a mandate after it has already been issued. 306 F.2d at 376.

> may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Retention of jurisdiction by a Court of Appeals, pending completion of such further proceedings as it has directed, is an accepted practice. As explained in *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 235 F.2d 631 (9th Cir. 1956):

> "The perfection of the original appeal herein operated to transfer to the Court of Appeals jurisdiction of the cause; the jurisdiction of the trial court ceased and that of the Court of Appeals attached. The trial court was thereafter without authority to act in matters relating to the subject matter until the mandate was returned. In this case the mandate did not authorize the trial court to enter a judgment. The mandate contemplated no new decree. Any attempt to do so is void and of no effect.
>
> "This Court vacated a part of the original judgment and remanded the case for a restricted and limited purpose. Such was accomplished by the filing of the amended and supplemental findings of fact. We conclude that these further findings are adequate to support the judgment on the counterclaim in this action originally appealed from, and this court has a retained jurisdiction arising from the original appeal to consider any attack now made upon the original judgment on the counterclaim, including the contention that the evidence does not support the findings. This we will proceed to do." at 632-633. (footnote omitted)

A limited remand can direct the district court to hold further hearings, see *Zachos* v. *Sherwin-Williams Co.*, 166

F.2d 79 (5th Cir. 1948), *judgment of affirmance reinstated*, 177 F.2d 762 (5th Cir. 1949):

> ". . . because of the failure really to try the issue of prior use, we order that our judgment of affirmance be suspended and that no mandate issue on it; and direct that the district court hear further evidence solely on the issue of prior use, and make findings of fact and conclusions of law thereon, and cause the same to be certified to this court to be considered by us as part of the record on this appeal. The parties will be thereafter given further hearing in this court. Let a mandate issue to the district court directing it to proceed thus." 166 F.2d at 81.

See also *Gordon* v. *Jefferson Davis Parish School Board*, 446 F.2d 266 (5th Cir. 1971), *reh. denied*, 460 F.2d 1062 (5th Cir. 1972); *Henderson* v. *United States*, 349 F.2d 712 (D.C. Cir. 1965); *McLindon* v. *United States*, 329 F.2d 238 (D.C. Cir. 1964). The further findings of a district court may be returned to the Court of Appeals as a "supplemental" record, as directed in *Cross* v. *Pasley*, 267 F.2d 824 (8th Cir. 1959), *modified on return of supplemental record*, 270 F. 2d 88 (8th Cir. 1959), *cert. denied*, 362 U.S. 902 (1960):

> "Accordingly, the district court is hereby directed to make and enter additional and appropriate findings of fact and conclusions of law nunc pro tunc as of the date of the original findings, and that as so entered such additional findings and conclusions be certified to this court as a supplemental record. Jurisdiction is retained." 267 F.2d at 827.

Upon receipt of a district court's further findings and conclusions, the Court of Appeals may affirm, *e.g.*, *United States* v. *Ueber*, 303 F.2d 462 (6th Cir. 1962), or reverse,

e.g., *United States* v. *Texas Education Agency*, 459 F.2d 600 (5th Cir. 1972), or reinstate the original mandate which it had suspended, see *Zachos* v. *Sherwin-Williams Co.*, *supra*. Examples of the utility and propriety of the Courts of Appeals withholding final judgment while, by means of the limited remand, further proceedings are completed in the courts and agencies below, are *Iannarelli* v. *Morton*, 463 F.2d 179 (3rd Cir. 1972); *AG Pro, Inc.* v. *Sakraida*, 481 F.2d 668 (5th Cir. 1973); *Cf. WKAT, Inc.* v. *Federal Communications Commission*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied sub nom. Public Service Television, Inc.* v. *Federal Communications Commission*, 368 U.S. 841 (1961).

C. Eisen I.

As this Court knows, in 1966-7 there was a question of the Court of Appeals' jurisdiction, but that question was resolved in favor of jurisdiction. *Eisen I*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); A104. Defendants argued then (see page 5, *supra*) that the District Court's initial order (41 F.R.D. 147; A93) was not appealable (see defendants' March 23, 1967 petition for certiorari filed in this Court, No. 1195, October Term, 1966). Defendants adhere to that position.

Since that time, the "death knell" doctrine has been rejected by the Court of Appeals for the Third Circuit, *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), *cert. denied*, 407 U.S. 925 (1972), and the Court of Appeals for the Seventh Circuit, *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973). The Court of Appeals for the Fifth Circuit accepts the concept, but limits its application to cases where its need is clear. *Graci* v. *United States*, 472 F.2d 124 (5th Cir.

1973); *Songy* v. *Coastal Chemical Corp.*, 469 F.2d 709 (5th Cir. 1972); *Miller* v. *Mackey International, Inc.*, 452 F.2d 424, 427 n.3 (5th Cir. 1971); *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971); *Lamarche* v. *Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971). The Court of Appeals for the Ninth Circuit notes the existence of the doctrine as being so limited as not to apply to the cases which have come before it. *Falk* v. *Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972); *Weingartner* v. *Union Oil Company of California*, 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

The Court of Appeals for the Second Circuit has adhered to the doctrine. *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969); *Green* v. *Wolf Corp.*, 406 F.2d 291, 295 n.6 (2d Cir. 1968) *cert. denied*, 395 U.S. 977 (1969). But even in the Second Circuit doubts about the doctrine have been expressed. See *Korn* v. *Franchard*, *supra*, at 1307, and *Lerman* v. *Tenney*, 459 F.2d 482 (2d Cir. 1972) (Friendly, C.J., concurring in both cases). Apparently in the Second Circuit the doctrine is limited to claims of individual damage on the order of $1000 or less, and there is concern about the need to provide fairness to defendants, as reflected by footnote 1 in *Eisen III*, 479 F.2d at 1007; A348-9, and by Judge Friendly in *Korn* v. *Franchard Corp.*, *supra*, 443 F.2d at 1307.

The point need not be decided now. Even absent the "death knell" ruling, there were ample independent grounds

for immediate appellate review of the District Court's orders supporting its "class" determinations. On the other hand, if the "death knell" question were correctly decided against defendants in 1966, that decision provides an additional basis of jurisdiction now: it supports the jurisdiction which was exercised by the Court of Appeals in *Eisen II* and retained until *Eisen III*.

D. Appeals in other cases.

Plaintiff extravagantly claims that the Court of Appeals has held that "all class action determinations are appealable . . ." (Br. 16). The Court of Appeals did not so hold. The Court stated that the Court of Appeals' jurisdiction ran equally to defendants, in this case, where jurisdiction had already been invoked on behalf of plaintiff (479 F.2d at 1007 n. 1, A348), and went on to argue that class action determinations "should be" appealable in the future. The footnote stated that by "extension or interpretation of *Eisen I*" defendants should be able to appeal class action determinations where, as here, the requisites of *Cohen* are met and delay in review would cause irreparable harm. If it had held every class action determination appealable, it would have revolutionized, by a footnote, the law of the Second Circuit, *e.g.*, *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). No Circuit Judge in the opinions on rehearing in *Eisen III* adverted to such a revolution or suggested that there was any lack of jurisdiction in the Court of Appeals to hear this particular case.

There need be no fear this case presages numerous appeals of class action determinations. This case, and the precedent it furnishes, will serve to reduce the number of such appeals, because it settles substantial questions of law. The principle was recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949):

> "Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." at 547.

As stated in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964):

> "However, in this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area. See *Van Dusen* v. *Barrack*, 376 U.S. 612. As this Court stated in *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706:
>
> > '[W]e think it clear that where the subject concerns the enforcement of the . . . Rules which by law it is the duty of this Court to formulate and put in force . . . it may . . . deal directly with the District Court. . . .'
>
> See *McCullough* v. *Cosgrave*, 309 U.S. 634.
>
> "This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the District Court was in error in

applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' *Parr* v. *United States*, 351 U.S. 513, 520; see *Bankers Life & Casualty Co.* v. *Holland*, *supra*, at 382." 379 U.S. at 112.

VII

The decision below is supported by compelling principles of public policy.

The philosophy running through the District Court's decisions is that plaintiff's action must be afforded class action status, and that no cost is too great to attain that end because defendants, who are alleged to be lawbreakers, will otherwise go unpunished and retain their ill-gotten gains. See American College of Trial Lawyers Report, *supra*, at pp. 18, 21 thereof. The cost of class action status here would have been violation of the principles of the substantive law under which this action is brought, the due process guarantees to both defendants and class members, defendants' Seventh Amendment guarantee, and Rule 23. Other costs would have been the imposition of a great burden on the judicial process and subverision of compelling principles of public policy. In commenting on such costs, the American College of Trial Lawyers Report, *supra*, has said:

> "The (b)(3) class suit has mandated heavy expenditures of judicial time, effort and expense. The expenditures have been sustained only by sacrificing procedural and substantive fairness to the

> party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class claimants." at p. 6.

Rule 23(b)(3) was designed to achieve "economies of time, effort and expense . . ." in situations where common class questions predominated over solely individual questions. Advisory Note, 39 F.R.D. at 102; 19 sa. The Advisory Committee stated that "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device." *Id.* at 103; 19 sa. Thus, according to the Advisory Committee, Rule 23(b)(3) is a device for consolidating numerous *existing* claims in one forum to prevent repetitious litigation and to achieve "economies of time, effort and expense." Here, on the other hand, plaintiff *sua sponte* has brought into the District Court 6,000,000 people who had made no claim and surely would not have made any claim were it not for the gleam in a lawyer's eye.

Recognition of the limited capabilities of our federal judicial system is essential if Rule 23, due process and the right to trial by jury guaranteed by the Seventh Amendment are to survive.

> "In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, at 298 (2d Cir. 1969)

The Chief Justice has warned that "the federal court system is for a limited purpose, and lawyers, the Congress and the public must carefully examine each demand they make on that system." [28] Both the Second and the Eighth Circuit Courts of Appeal have observed the heavy demand made upon the courts by the mass consumer claims asserted in the *Antibiotics* cases. *Pfizer, Inc.* v. *Lord*, 449 F.2d 119, 121 (2d Cir. 1971) ("sizeable judicial resources" were consumed); *Pfizer, Inc.* v. *Lord*, 456 F.2d 532, 542 (8th Cir. 1972) ("unusual burdens upon an already overburdened federal court system"). As the Court of Appeals for the Third Circuit has said in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), *cert. denied* 407 U.S. 925 (1972) ". . . scarce federal resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong . . ." at 626. The limited benefits (if any) that class actions such as this produce for class members are far outweighed by the fact that ultimately the costs of such litigation will be borne by the public itself as taxpayers, shareholders and consumers; and by litigants who seek access to already overcrowded federal courts for vindication of real and substantial claims.

The only justification that has been advanced for permitting this case to be maintained as a class action is that alleged "wrongdoers" cannot be permitted to "retain the fruits of their illegality" or future wrongdoers will not be deterred from violation of the antitrust laws and the Exchange Act. It is such deterrence, it is argued, that justi-

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28. Burger, "The State of the Judiciary—1970", 56 A.B.A.J. 929, 933 (1970).

fies perversion of the substantive rights of defendants and absent class members. Plaintiff urges that the Court of Appeals has unjustifiably limited the discretion of the District Court to implement this perception of public policy.[29] The discretion of a district court, however, must be brought up short where it results in invasion of substantive rights. The orders of the District Court are exactly the kind Mr. Justice Black warned against in his 1966 dissent from the Court's promulgation of Rule 23:

> "I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' " 383 U.S. 1032, 1035.

If application of Rule 23 is determined by collateral considerations, such as its use to promote what some conceive

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29. Plaintiff relies on lengthy quotations from the panel decision in *Katz* v. *Carte Blanche Corporation*, F.2d , 17 F.R. Serv. 2d 279 (3d Cir. 1973), (petition for rehearing in banc granted, June 20, 1973), to support his argument that the Court of Appeals in *Eisen III* unjustifiably limited the discretion of the District Court. It should be noted, however, that in *Katz* the full Court in its order of June 20, 1973 granting the *in banc* petition *vacated* the judgment of the panel. A copy of the Court's order is reprinted in the appendix hereto. 29-30 sa.

to be desirable ends, its application would eventually be capricious and depend upon varying philosophies of the district courts as to what type of litigation is, or is not socially beneficial. By contrast, the Court of Appeals below instructed that the determination must be made on the criteria set forth in Rule 23.

Insistence upon such neutral criteria in *Eisen II* and *Eisen III* will not have the consequence forecast by plaintiff, Judge Oakes or the *amici* briefs supporting reversal. The decision below is carefully limited and circumscribed to apply only to "such a case as this". This case involves a class of millions of members dispersed throughout the world. The alleged claims are *in personam* for miniscule money damages. Any possible injunctive relief has long been moot. The names and addresses of millions of class members are identifiable with reasonable effort. More millions of the class members are not identifiable. The relationship between class members and defendants is the classic adversarial relationship with no continuing communication.

The Court of Appeals' decisions (*Eisen II and Eisen III*) leave ample room for effective civil rights and environmental suits. Such suits are traditionally brought for injunctive relief and, under the decisions below, would not be subject to the notice requirements specified in *Eisen;* nor do they require a "fluid recovery" in order to be manageable. Indeed, in cases such as those class action designation is largely a formality for the plaintiffs. What is important is that the judgment naturally benefits all persons similarly situated. See *Galvan* v. *Levine*, Dk. No. 73-1294 (2d Cir. December 3, 1973) (slip decision), where the

Court of Appeals affirmed denial of class action status for a suit under the Civil Rights Act brought on behalf of Puerto Ricans similarly situated who allegedly had been denied unemployment compensation benefits. The Court said:

> ". . . But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in *Vulcan Society* v. *Civil Service Comm'n*, — F.2d —, — (1973), slip opinions, —, —, what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated, see *Bailey* v. *Patterson*, 323 F.2d 201, 206-07 (5 Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); cf. *United States* v. *Hall*, 472 F.2d 261, 266 (5 Cir. 1972), as the judgment did here." at slip opinion pp. 569-570.

The great progress made in civil rights decisional law before 1966 suffered little from the absence of amended Rule 23. Suits for money damages under environmental or civil rights laws are brought on behalf of classes far more circumscribed than in *Eisen*, such as downstream land owners or inhabitants of a single school district. Individual notice can be given to such classes where names and addresses are available with reasonable effort; or if they are not available, notice by publication would not be a "farce". Such cases are among those as to which the Court of Appeals did "not attempt any enumeration."

On the other hand, if the District Court's decisions had been allowed to become law, defendants in large purported class actions such as this would have been presented with the choice of continuing to litigate such monstrous class actions on the merits with the risk of financial ruin should they fail or settling as "an insurance policy" against ruin. See Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits," 26 Record of the Association of the Bar of the City of New York 124, 127-134 (February, 1971). The Court of Appeals for the Second Circuit has noted that this *in terrorem* effect of Rule 23(b)(3) actions was never intended by Congress to supplement the remedies provided by the antitrust laws:

> ". . . if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress. If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few 'bright lines' in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds." *Calderone Enterprises* v. *United Artist Theatre Circuit*, 454 F.2d

> 1292, at 1295 (2d Cir. 1971), *cert. denied* 406 U.S. 930 (1972). (footnote omitted)

One commentator[30] has written of his observation of the dynamics of the *in terrorem* factor in *City of Philadelphia* v. *American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971):

> "At the hearing on the class action issue in the *Newark Gasoline* cases, a prominent plaintiffs' antitrust lawyer assured the Court that a class action on behalf of eight million users was manageable because:
>
> > 'I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class.' (tr. of proceedings, March 1, 1971, at 11)
>
> He added that two defendants had already settled, contingent upon the approval of the class, and added:
>
> > 'When two very competently represented and major litigants have settled, I think it shows this. *It shows that the problem is manageable.* It shows that they feel that this is the way that the litigation can be disposed of by settlement, namely, by having a class; whereas, if there were no class, it would not be disposed of by settlement. So I think that you sow the seed for the possibility of a settlement.' (*id*)" *Simon, supra*, 55 F.R.D. at 390. (emphases are those of the commentator)

Failure to observe accepted procedural and substantive requirements in class action determinations deprives defendants who maintain their innocence of a right to a trial

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30. Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, at 388-389 (1972).

on the merits. See *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972), in which Judge Pollack, in denying class action status, said:

> "If Rule 23 as applied can principally result only in *in terrorem* accomplishments as a practical solution to gargantuan litigation, it is high time for needed revision along lines of practicality and the facts of litigation life. It is time then to seek a fairer balancing of the public interests at stake in order to aid the acknowledged wards of the Courts, the holders of small economic stakes in the injuries pictured.
>
> "As far as this court is aware, there are only isolated instances of the completion of actual trial of any class action litigation since the new Rules thereon went into effect. The dramatic recoveries that have been achieved in class actions have not been the result of a test of the merits in the crucible of a trial. This anomaly suggests that litigation is not necessarily the fair and just method of administering injuries involving hordes of individuals with variegated individual claims or defenses." at 337. (footnote omitted)

See *Bogosian* v. *Gulf Oil Corporation*, 71 Civ. 1137 (E.D. Pa. December 19, 1973)

This *in terrorem* effect has been called legalized blackmail:

> "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional rights to a trial on the merits." Handler, *supra*, 26 Record at 130 (1971).

Counsel for defendants know of no large class action which has gone to trial, though economically forced settlements are legion. The result of the District Court's decisions would have permitted any lawyer who could draft a complaint to obtain a favorable class action decision and then an unwarranted settlement. There would, in short, be the danger that the Court of Appeals warned against in *Eisen II* (391 F.2d at 567; A126)—suits brought only for the benefit of lawyers. The American College of Trial Lawyers Report, *supra*, has concluded on the basis of the District Court's findings in this case that:

> "The District Court, upon remand by the United States Court of Appeals for the Second Circuit, has made a 'guesstimate' as to damages suffered by an average member of the 'class' and has arrived at a figure of approximately $1.30. As the action purports to be a treble damage action, the average recovery by the average odd-lot trader for the six years in question amounts to $3.90. If the Court is accurate in its 'guesstimate', the answer as to the number of claims that would be filed if plaintiff wins is a simple one: for all practical purposes, none. This is so because the cost of producing the records, if available, and typing and filing the simplest proof of claim would amount to many times the amount of the recovery in the average case. The District Court also estimated that the total amount of damages suffered by the 'class' of six million is somewhere between $22,000,000 and $60,000,000. If attorneys for the 'class' are successful and are awarded the usual percentage of the recovery, they will receive at least $5,400,000 whereas each plaintiff in the 'class', if he bothers to collect the records and file a proof of claim, will receive an average of $3.90." at 23-24.

The argument that actions such as this can only be maintained as class actions, and that if they are not alleged wrongdoers will not be brought to heel, is simplistic. The facts of this case do not cry out for the extraordinary treatment plaintiff seeks. The Department of Justice serves as the guardian of the public interest under the antitrust laws. In 1969 it permitted the alleged conspirators to merge, and they are now conducting the odd-lot business as the only odd-lot firm on the Exchange. Plaintiff has always had an available forum in which to appear formally or informally to petition the S.E.C. for relief from an inappropriate odd-lot differential, and could have obtained judicial review of any action or inaction of the S.E.C.

The Court below recognized that existing law did not afford a forum through which compensation can be made available for millions of dispersed consumers asserting small claims under the antitrust, securities and other laws. 479 F.2d at 1019; A372-373. The Court also recognized that it was beyond the power of the federal courts to create that forum by interpretation of Rule 23 to effect substantive changes in the law.

> "From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress." *ibid.*

This Court has stated that determination of policy concerning consumer class actions in federal courts should occur in the Congress:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." *Snyder* v. *Harris, supra*, 394 U.S. at 341-342.[31]

If plaintiff believes he has a meritorious claim—and is not merely relying on the *in terrorem* factor—the Court of Appeals' decision permits plaintiff to continue to prosecute this action on his own behalf. There is sufficient incentive for him, and his lawyers, to do so. Plaintiff has the incentive of treble damages, which will be the same in an individual action and a class action. Section 4 of the Clayton Act also permits recovery of a "reasonable attorneys' fee" by a successful antitrust plaintiff, and this fee is not limited to a portion of the damages recovered but is to be computed on the basis of the worth of the services.[32] The

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31. The Senate Commerce Committee is presently studying the question of consumer class actions.

32. See e.g. *Courtesy Chevrolet* v. *Tennessee Walking Horse B. & E.A.*, 393 F.2d 75 (9th Cir.), *cert. denied* 393 U.S. 938 (1968) (damages of $3,400; attorneys' fees of $10,000); *Advance Business Systems and Supply Co.* v. *SCM Corporation*, 287 F.Supp. 143 (D.Md. 1968), *aff'd* 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (damages of $16,714;

possibility of such an award was not considered by the Court of Appeals when it rendered its 1966 "death knell" decision. 370 F.2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967); A104.

If plaintiff is unwilling to continue his individual action, the observation of Court of Appeals for the Third Circuit is appropriate:

> "If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight. . . . If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." *Hackett* v. *General Host Corp., supra*, 455 F.2d at 625-626.

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attorneys' fees of $35,875); *Vandervelde* v. *Put and Call Brokers and Dealers Ass'n.*, 344 F.Supp. 118 (S.D.N.Y. 1972) (damages of $36,870; attorneys' fees of $55,000); *Finley* v. *Music Corp. of America*, 66 F.Supp. 569 (S.D. Cal. 1946) (no damages; attorneys' fees of over $9,000); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F.Supp. 490 (D. Mass. 1963), *reversed on other grounds*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964) (damages of under $30,000; attorneys' fees of $68,000); *Montague & Co.* v. *Lowry*, 193 U.S. 38, 48 (1904) (an attorney's fee of 150% of the damages awarded); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir.), *cert. denied*, 382 U.S. 904 (1965) (allowing a $50,000 attorneys' fee based upon hours spent in preparation and trial).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rules Enabling Act, 28 U.S.C. § 2072

§ 2072. RULES OF CIVIL PROCEDURE.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 103, 63 Stat. 104; July 18, 1949, ch. 343, § 2, 63 Stat. 446; May 10, 1950, ch. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323.)

28 U.S.C. § 2106

§ 2106. DETERMINATION.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, ch. 646, 62 Stat. 963.)

Section 19, Securities Exchange Act of 1934, 15 U.S.C. § 78s

§ 78s. POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this chapter or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such trans-

action any provision of this chapter or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours

of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff,

—against—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants.

PLAINTIFF DEMANDS JURY TRIAL

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange, similarly situated, alleges:

AS A FIRST CAUSE OF ACTION AGAINST DEFENDANTS CARLISLE & JACQUELIN, AND DECOPPET & DOREMUS:

1. That this first cause of action arises under the Sherman Antitrust Act, § 1, 15 U.S.C. § 1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, § 4, 15 U.S.C. § 15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national. . . .

Advisory Committee's Note to Rule 23

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L. Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had

considerable difficulty with these terms. See, *e.g.*, *Gullo* v. *Veterans' Coop H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D. Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F. Supp. 763 (E.D. Pa. 1939, *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F.Supp. 592 (E.D. Pa. 1941), *rev'd sub nom. Pennsylvania Co. for Ins. on Lives* v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, *supra*, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, *e.g.*, *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W.D. Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill. 1951); *National Hairdressers' & C. Assn.* v. *Philad Co.*, 34 F.Supp. 264 (D.Del. 1940); 41 F.Supp. 701 (D.Del. 1940), *aff'd mem.*, 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, *e.g.*, *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd*

on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, *supra*, at 208); *cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945). But *cf.* the early decisions, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch. Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice* ¶¶23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); but *cf. P. W. Husserl, Inc.* v. *Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas* v. *Day*, 161 F.Supp. 916 (D.Colo. 1958). On ancillary intervention, see *Amen* v. *Black*, 234 F.2d 12 (10th Cir. 1956), *cert. granted*, 352 U.S. 888 (1956), *dism. on stip.*, 355 U.S. 600 (1958); but *cf. Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c) (1) below.

Advisory Committee's Note to Rule 23

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra*, at 230-31; Keeffe, Levy & Donovan, *supra; Developments in the Law, supra*, 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ. P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions

Subdivision (*a*) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder or the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §562, at 265, §572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See *e.g.*, *Giordano* v. *Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v.

Erwin, 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b) (1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a) (2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 *Colum.L.Rev.* 1254, 1259-60 (1961); *cf.* 3 Moore, *supra*, ¶23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to

act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney*, 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug*, 142 F. Supp. 1, 154-59 (S.D.Calif.1956), *on app., State of California* v. *Rank*, 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole*, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959); *cf. Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir. 1955); 3 Moore, *supra*, ¶23.11 [2], at 3458-59.

Clause (*B*): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been

possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn. 1939); *cf. Smith* v. *Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim See *Knapp* v. *Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway, Corp.*, 81 F.Supp. 957 (D. Del.1949); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel* v. *Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich.1951), *app.dism.*, 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.*, 111 F.Supp. 382 (E.D. Mich.1953); *Dann* v. *Studebaker-Packard Corp.*, 288 F. 2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.*, 94 F. Supp. 549 (S.D.Calif.1950); *Ames* v. *Mengel Co.*, 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries,

and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *cf. York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. *Cf. Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); 3 Moore, *supra*, at ¶23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed

duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (*b*)(*2*). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir.

1963), *cert. denied*, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County, Fla.* 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N. C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), *aff'd*, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those

cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N. Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In

these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R. R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); *cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b) (3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, *supra*, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties

ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b) (3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, *supra*, at 273-75, regarding policy of Fair Labor Standards Act of 1938, §16(b), 29 U.S.C. §216(b), prior to amendment by Portal-to-Portal Act of 1947 §5(a). [The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c) (2) below, of the right of members to be excluded from the class upon their request.)

Advisory Committee's Note to Rule 23

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c) (1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference

to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d) (2).

Subdivision (c) (2) makes special provision for class actions maintained under subdivision (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d) (2) below.)

Subdivision (c) (3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b) (1) or (b) (2), those found by the court to be class members; in a class action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting

those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c) (4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, ¶23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d

Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del. 1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv Stat. Assn.* v. *Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D. Tenn.1941); Kalven & Rosenfield, *supra*, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law*, *supra*, 71 Harv.L.Rev. at 935; 2 Barron & Holtzhoff, *supra*, §568; but *cf. Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D. Calif.1942); Chafee, *supra*, at 280, 285; 3 Moore, *supra*, ¶23.12, at 3476. Under proposed subdivision (c) (3), one-way intervention is excluded; the action will have been early determined to be a class or non-class action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, *supra*, at 284; Weinstein, *supra*, 9 Buffalo L.Rev. at 460.

Advisory Committee's Note to Rule 23

Subdivision (*c*) (*4*). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (*d*) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d) (1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d) (2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (¶62869); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to im-

prove the representation of the class. *Cf. Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d) (2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d) (2) may be particularly useful and advisable in certain class actions maintained under subdivision (b) (3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *cf. Dickinson* v. *Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the

particular purpose but needed not comply with the formalities for service of process. See Chafee, *supra*, at 230-31; *Brendle* v. *Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.*, 201 F. Supp. 934 (D.Mass. 1962); *Hormel* v. *United States*, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (*e*) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Order Granting Petition for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,

Appellant

PRESENT: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges*.

ORDER

The Petition for Rehearing filed by defendant-appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the Circuit in regular active service, and a majority of such active circuit judges having voted for rehearing en banc,

IT IS ORDERED that the Petition for Rehearing en banc is granted, the judgment of this court dated May 22, 1973, is vacated, and the Clerk of this court shall list this appeal

for rehearing or reconsideration before the court en banc at the convenience of the court.

BY THE COURT:—

VAN DUSEN
Circuit Judge

Dated: June 20, 1973

RECEIVED & FILED
JUN 20, 1973
THOMAS F. QUINN
Clerk

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "Odd-Lots" on the New York Stock Exchange similarly situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN COLLEGE OF TRIAL LAWYERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American College of Trial Lawyers respectfully moves this Court for leave to file a brief *amicus curiae* in this action pursuant to Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioner and for the respondents, respectively, was requested but refused.

The American College of Trial Lawyers is a national organization of trial attorneys, each of whom is admitted to practice before the highest court in his state and has been engaged in trial practice for at least 15 years. Among

the objects of the College is "to improve and enhance the standards of trial practice [and] the administration of justice . . . ." *

In 1970, the American College of Trial Lawyers established a Special Committee on Rule 23 of the Federal Rules of Civil Procedure to evaluate the performance of Rule 23 as amended in 1966 and to recommend revisions to better effectuate the purposes of the Rule. At the time of that amendment it was widely recognized that the impact of the amended Rule could not be accurately predicted, and that the Rule was an experiment to be tested in the crucible of the courtroom.** Evaluation of the practical effectiveness of the Rule necessarily awaited actual litigation involving its application. The Special Committee's assignment was to make such an evaluation on behalf of and report to the American College of Trial Lawyers.

The members of the Special Committee are experienced trial attorneys who practice in major centers of commercial litigation and are deeply involved with the day to day application of Rule 23. On March 15, 1972, the Special Committee issued its report and recommendations which were approved by the Board of Regents of the American College of Trial Lawyers.*** The *Report* proposed revisions of Rule 23 which were designed as further steps towards the Rule's as yet unrealized goals of economy in judicial administration and uniformity of result without sacrifice of proced-

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* Article II, By-Laws of the American College of Trial Lawyers.

** Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 102-03 (1966).

*** American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972).

ural fairness. It is the continuing interest of the American College of Trial Lawyers in those goals that has prompted the filing of this motion; and it is this point of view which the College seeks to present in its *amicus curiae* brief.

The American College of Trial Lawyers respectfully requests the leave of this Court to file a brief *amicus curiae* to present the considerations of broader policy with which, through its exhaustive examination of the performance of Rule 23, it has become particularly concerned.

Respectfully submitted,

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December 28, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "Odd-Lots" on the New York Stock Exchange similarly situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN COLLEGE OF TRIAL LAWYERS

Questions Involved

The American College of Trial Lawyers will address itself in this brief *amicus curiae* to the following questions only:

1. Was the Court of Appeals correct in holding that this class suit was unmanageable and could not be transformed into a manageable action by the imposition of a "fluid" dollar judgment which, in large part, would not be dis-

tributed to individual members of the class to compensate them for damages allegedly suffered by them?

2. Do Rule 23 of the Federal Rules of Civil Procedure and the Fifth Amendment to the Constitution of the United States require that actual notice of a class determination pursuant to Rule 23 be given to those individual members of the class whose names and addresses are known, and did the Court of Appeals hold correctly that, ordinarily, such notice must be given at plaintiff's expense?

I.

The action is wholly unmanageable as a class suit and cannot be transformed into a manageable action by unacceptable notions of "fluid class recovery."

Rule 23, promulgated by this Court in 1966, was bottomed upon considerations of sound judicial administration and the "fair and efficient adjudication of the controversy."* Thus the trial court in any class suit must focus at the outset upon "the difficulties likely to be encountered in the management of a class action." The Rule explicitly so provides in paragraph (b) (3) (D).

In drafting the Rule, this Court's Advisory Committee recognized that a preeminent purpose was the concentration in a single forum of multitudinous claims which otherwise would be litigated separately in many state and federal courts. Advisory Committee's Note, 39 F.R.D. at 104.

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* Rule 23(b)(3) of the Federal Rules of Civil Procedure; *see* Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 102-03 (1966) (hereinafter cited as the "Advisory Committee's Note").

That preeminent purpose of the Rule would not be served here and petitioner cannot claim otherwise. As the District Court found, the interest of individual class members in any potential recovery

> " . . . is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims." (A216)

In other words, were it not for the expansive interpretation given to Rule 23 by the District Court, no federal court would ever be burdened with the massive and complex claims which are now before this Court, seeking individually miniscule damages for millions of unidentified persons. We submit that it was never this Court's purpose to add such monumental burdens to the dockets of the federal courts or to convert the federal district courts into small claims courts.*

The findings of the District Court permit no doubt that the burden which petitioner would lay upon the federal judicial system would transcend any conceivable level of tolerance and would indeed be impossible to discharge. The plaintiff class would consist of approximately 6,000,000 people, residing throughout the world, who bought or sold securities in odd-lots on the New York Stock Exchange over the four-year period from May 1962 through June 1966. The average class member had approximately five odd-lot transactions during the four-year period for which

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* "** [T]he public interest may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every wrong, however slight." *Hackett* v. *General Host Corp.*, 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

the court below estimated that the aggregate illegal overcharge, if any, would be approximately $1.30 and the average recovery by an individual member of the class after trebling would be approximately $3.90.* (A353-54; *see also* A 218 n.8)

Bearing in mind that petitioner has exercised his constitutional right to demand trial by jury, each and every class member who had not elected previously to be excluded from the class would be required to prove to a jury that he effected odd-lot transactions on the New York Stock Exchange at times when the odd-lot differential was unlawfully fixed by the respondents.** At the very least, each member of the class would be required to prove each of his odd-lot transactions and the dollar amount of the odd-lot differential paid by him. No claimant ordinarily would know which odd-lot dealer executed his transaction (*see* A111-12), and the requisite proof is not available in the books and records of the respondents (A215); each claimant would probably be compelled to subpoena the records of the stockbroker who, on his behalf, forwarded his odd-lot order to one of the two respondent odd-lot dealers who are named as defendants in this action (A111; *see also* A37-38, A41-42, A45-46, A51-52, A54-56, A57-58, A61-62).

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* At the outset of the litigation, the maximum recovery, trebled, by the members of the alleged class was projected at $60,000,000 (A218), or an average of $10 for each of the 6,000,000 class members. Petitioner now asserts that this "estimate is somewhat conservative" and that the "maximum damages may be as much as $120 million" (Petr.'s Br., p. 42 n.23), thereby increasing the average claim to $20.

** *See, e.g., Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 476 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494 (1931); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); *Sablosky* v. *Paramount Film Distrib. Corp.*, 13 F.R.D. 138, 140 (E.D. Pa. 1952).

It is readily apparent that even after a protracted trial of the complex antitrust and regulatory issues affecting the class as a whole, the trial court would be confronted with an assignment so massive that it could not possibly be discharged. Even if we assume that only 100,000 of 6,000,000 potential claimants come forward to press their claims and assume further that a trial judge and jury could adjudicate four claims each day, five days each week for 52 weeks each year, the claims could not be determined in a manner consistent with the Constitution in much less than 100 years.* The burden would be im-

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* "In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

"Parenthetically, the notion of utilizing a jury trial in a class suit containing the varied problems certain to abound herein, is enough to chill any further discussion of the required superiority of a class claim over other available methods for the fair and efficient adjudication of the controversy. Such a trial, whether one trial or the multiple mini-trials probably required, would withdraw from all other usefulness for years to come the federal judicial personnel involved. Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask—what public interest would be served by devoting the public's facilities in this way and what just purpose requires such a colossal marshalling of judicial resources and their supporting personnel?" *Schaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

See also Hettinger v. *Glass Specialty Co.*, 1973 Trade Cas. ¶ 74,487, p. 94,164 (N.D. Ill. 1973); *Cotchett* v. *Avis Rent A Car System, Inc.*, 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (Tyler, J.).

possible even under the more informal procedures of the small claims courts.*

To say that such a case is "manageable" is nothing less than delusion. Equally deluding is the argument that the trial court should first concern itself with the adjudication of "common" class issues such as liability and only later worry about such matters as individual jury trials for claimants who seek to prove injury. *See City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 71-72 (D.N.J. 1971); *Morris* v. *Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971); *Harris* v. *Jones*, 41 F.R.D. 70, 73 n.5 (D. Utah 1966). The case could become "manageable" only by impermissible recognition that the office of Rule 23 is to force defendants into settlements in order to avoid interminable litigation and potentially ruinous exposure.

Recognizing that here "the benefits of individual recovery are not worth the price of litigating individual claims" (A216), the District Court attempted to transform the case into a manageable action by blue-printing a "fluid class re-

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* In the year ended June 30, 1972, the Small Claims Part of the Civil Court of the City of New York disposed of 57,214 claims. Of that number, 13,282 claims were tried and 2,272 were settled during trial. *Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1971 through June 30, 1972*, p. A97 (N. Y. Legislative Document No. 90, 1973). Each of the approximately 120 judges of the Civil Court sits from time to time in the Small Claims Part. Sessions are held in the evening hours throughout the year, except for Christmas week and holidays, at six locations in New York City. Civil Court judges preside at these locations at approximately 850 sessions per year and are assisted in the disposition of cases by 39 members of the bar, who serve without compensation as arbitrators (Letter to Mr. Marvin Schwartz dated December 17, 1973 from the Honorable Edward Thompson, a Justice of the Supreme Court of the State of New York who serves as Administrative Judge of the Civil Court of the City of New York).

covery" which, so far as we know, has never been adopted by any District Court in any adversary proceeding under Rule 23.* This was the procedure which Judge Medina, speaking for the Court of Appeals, found to be "fantastic". As Judge Medina said (A370),

> "We hold that the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."

Certainly in this respect the Court of Appeals was entirely correct.

Aside from all its other vices, a "fluid class recovery" would *not* solve any manageability problem. As the District Court described the procedure to be followed, those members of the class who elected to do so would be permitted to prove their individual claims to a jury. Individual claims would be satisfied to the extent they were proved, but "a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the Court until such time as the fund is depleted" (A217). As we have already observed, the adjudication of individual damage

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* *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281, 287-89 (S.D.N.Y.), *mandamus denied, sub nom., Pfizer, Inc.* v. *Lord*, 449 F.2d 119 (2d Cir. 1971). Relying primarily upon the District Court's decision in this case, the District Court in that case tentatively concluded that use of a "fluid class recovery" to minimize the manageability problems inherent in individual proof of damages was not constitutionally proscribed and *might* prove to be feasible. However, the District Court in the *Antibiotic Drugs* case did not hold—as did the District Court in this case—that any unclaimed funds could be employed to reduce future prices, or for some other "public purpose" benefiting the members of the class, but reserved decision as to the proper disposition of those "unclaimed funds" (and indicated that the defendants might not be permitted to "retain" those funds). *Id.* at 282-83, 287.

claims would be impossible even if only 100,000 out of 6,000,000 potential claims were filed (*see supra* at 5-6).

Further, the District Court erroneously contemplated "a future reduction of the odd-lot differential in an amount determined reasonable by the Court until such time as the fund is depleted" (A217). We submit that the regulatory scheme for stock exchanges prescribed by Congress in the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, puts entirely beyond the power and jurisdiction of the federal courts the fixing, in the guise of a forced prospective reduction, of the "reasonable" charges for stock exchange transactions.

Section 11(b) of the Exchange Act, 15 U.S.C. § 78k(b), gives to the Securities and Exchange Commission, but not to the federal courts, sweeping authority over stock exchange rules governing odd-lot dealers. Even more specifically, Section 19(b) of the Exchange Act, 15 U.S.C. § 78s (b), empowers the Commission to impose rules upon the stock exchanges with respect to "the fixing of reasonable rates of commission, interest, listing and other charges" and with respect to "odd-lot purchases and sales". The Commission is empowered so to act when "necessary or appropriate for the protection of investors." Congress has thus directed that it is for the Commission, rather than for the courts, to determine in the first instance the reasonableness of charges made by odd-lot dealers for transactions executed on an exchange.

We do not address ourselves to the apparently conflicting contentions of the parties as to whether the Commission has in fact exercised its ample authority to fix odd-lot differ-

tials. Suffice it to say, however, that the notion of "fluid class recovery" would intrude the courts, time and time again, into areas in which their competence is questionable. As Congress and state legislatures have recognized by a variety of regulatory statutes so numerous as to make citation superfluous, price regulation and determinations of "reasonable" rate levels are legislative and administrative functions for which courts are singularly ill-suited. *See Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 50-53 (1936); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *Columbus Gas & Fuel Co.* v. *City of Columbus*, 42 F. Supp. 762, 768 (S.D. Ohio 1941). Nothing in Rule 23 suggests that one of its imperatives is the intrusion of the federal courts, in the name of "fluid class recovery", into price regulation for the securities, transportation, energy, communications, credit, banking and a host of other industries.

The more basic vice of "fluid class recovery" as a device to make "manageable" that which is "unmanageable" is that through the use of a procedural rule, substantive law is changed by imposing "damages" where no damage or injury has been proved.* Thus the District Court in this case seemed prepared to impose a liability of perhaps $60,000,000 even if not a single class member, other than Eisen, came forward to prove injury and damages. The

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* The Rules Enabling Act, 28 U.S.C. § 2072, provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." In *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), this Court rejected a similar attempt to distort section 4 of the Clayton Act, emphasizing that recovery of treble damages is available only to those who prove that they sustained actual injury to their business property.

imposition of such liability is prohibited by section 4 of the Clayton Act, 15 U.S.C. § 15, which permits the recovery of damages only by persons injured in their business or property; absent proof of injury to business or property by individual class members, there could be no basis for the imposition of liability. While section 16 of the Clayton Act, 15 U.S.C. § 26, authorizes private injunction suits for violations of the antitrust laws, it is patently specious to suggest (Petr.'s Br., p. 51-52) that Congress intended that the Courts might award damages in injunction suits in circumstances where damages are not permitted under section 4. *See Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916).

No more should a procedural rule be applied to enlarge statutory regulatory schemes by providing new forms of deterrence or an added punishment not provided by Congress. It is not a novel principle of law that damages are to be awarded only upon proof of injury. That principle is as applicable to tort and contract litigation in general as it is to claims brought under the antitrust laws. *See* RESTATEMENT (SECOND) OF TORTS § 12A (1965); RESTATEMENT OF CONTRACTS § 326 (1932); C. MCCORMICK, DAMAGES §§ 1, 148-49 (1935).*

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* As the court below correctly noted (A357-58), *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (1967), does not provide "respectable precedent" for the "fluid class recovery" notion: that decision expressly recognized that each class member would ultimately be compelled to prove his damages, and the so-called "fluid class recovery" eventually adopted was the result of a ***settlement*** in which the defendant agreed to adjust the meters in its cabs so as to reduce the fare for future cab users.

The court in *Daar* merely held that the difficulties inherent in individual proof of damages by the class members was only "one factor to be considered" in determining whether a proposed class action satisfied the vague standards of section 382 of the California Code of

We submit that Rule 23 does not permit and was not intended to permit a roving commission in search of wrongdoing and the imposition of liability without proof of either injury or damage.

As one distinguished judge has said of Rule 23,

> "Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multimillion dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrongdoing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

Civil Procedure. 67 Cal. 2d at 713, 433 P.2d at 745. In marked contrast to the particularized criteria set forth in Rule 23, the California class action rule merely provides, in pertinent part: "when the question is one of a common or general interest of many persons or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." As is apparent from even a casual reading of the "Manual for Conduct of Pretrial Proceedings on Class Action Issues", promulgated by the Superior Court of the State of California for the County of Los Angeles, annexed as Appendix A to the *amicus* brief filed by the California Trial Lawyers Association, the procedures and considerations applied under the California class action rule are "very different" (A358) from those specified under Rule 23.

The "urgent attention" which Judge Friendly directs is not a matter for the courts. We would not suggest that large scale consumer frauds, where many individuals are mulcted in small amounts, should go unpunished or that those damaged should be left without a remedy. Nor would we be heard to say that class actions are inappropriate in environmental or civil rights cases, in most of which the proper remedy is an injunction. However, we respectfully submit that it is for the Congress and the Congress alone to determine what the remedies, if any, in such cases should be. We submit that Rule 23 should not be perverted to achieve a result which we believe this Court never intended and which was certainly not apparent to Congress when amended Rule 23 was laid before it.

II.

Individual notice must be given to each class member whose name and address can be determined, and, ordinarily, a plaintiff must initially bear the expense of providing notice to the class.

Class action procedures are an exception to one's fundamental right to control litigation affecting his own legal rights, an exception which "can be tolerated, if not completely justified, only if there is fealty to both the spirit and letter of the procedural rules, including those relating to notice."* Nor can defendants fairly be subjected to the huge expense of class suits unless there is strict observance in each case of the due process requirements essential to

* *Greenfield* v. *Villager Indus., Inc.*, 483 F.2d 824, 831-32 (3d Cir. 1973).

ensure that the judgment will bind all members of the class.*

In its initial determination of the class action issues in this case, the District Court held that "both the Rule and concepts of due process require individual notice for class members who can be identified" and, inferentially, that the plaintiff would be required, at least initially, to bear the expense of providing the requisite notice (A101).

The District Court's subsequent decisions to the contrary (A199, A275) seem attributable to its misunderstanding of the Court of Appeals' opinion which accompanied the reversal of the District Court's initial denial of class action status (A110). In any event, the District Court's ultimate decision that actual notice need not be given even to class members whose names and addresses are known was clearly prohibited by Rule 23 itself and is incompatible with the due process requirements of the Fifth Amendment.

The federal courts have consistently and correctly held that actions cannot be maintained as class suits under either subdivision (b)(1) or (b)(2) of the amended Rule 23 if they seek exclusively or primarily to recover money damages on behalf of persons having no common tie other than their interest in a predominating question of fact or law. *See, e.g., Free World Foreign Cars, Inc.* v. *Alfa Romeo S.p.A.*, 55 F.R.D. 26, 29-30 & n.9 (S.D.N.Y. 1972); *Goldman* v. *First Nat'l Bank*, 16 Fed. Rules Serv. 2d 840, 845-46 (N.D. Ill. 1972); *see generally* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 [10. -3], p. 23-29 (2d ed. 1969). It seems incontrovertible, as both the District Court (A95) and the

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* *Greenfield* v. *Villager Indus., Inc., supra* at 831; M. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 Antitrust L. J. 295, 297-98 (1966).

Court of Appeals (A121) held in this case, that a private treble damage action under the federal antitrust laws can be maintained as a class action, if at all, only if it satisfies the prerequisites of Rule 23(b)(3).

Rule 23(c)(2) expressly provides that individual notice must be given to each prospective member of a (b)(3) class "who can be identified through reasonable effort." This Court has repeatedly held that due process requires individual notice to those whose names and addresses are known if an adjudication of their legally protected interests is to be binding upon them and that as to such persons, mere notice by publication is insufficient. *Schroeder* v. *City of New York*, 371 U.S. 208, 212-13 (1962); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950). The notice provisions of paragraph (c)(2) were designed by the Advisory Committee to fulfill those requirements of due process so that a judgment in a (b)(3) class action—unlike a judgment in the predecessor "spurious class action"—could constitutionally be made binding upon the absent members of the class. Advisory Committee's Note, 39 F.R.D. at 107.

Apparently overlooked by petitioner, and in the *amicus curiae* briefs filed in his support, is that amended Rule 23 may be applied to a *defendant* class; it is not limited to a plaintiff class. In considering the requirements of due process, would any court or any responsible lawyer assert that if the tables were turned, and if a multitude of individuals and corporations (including many who reside in foreign countries), whose names and addresses are known, were named as a *defendant* class, that actual notice to only a sampling of those defendants and publication in five

newspapers would satisfy due process requirements, and that a judgment against the class would be binding and enforceable against each of the defendant class members? While there may be circumstances in which Rule 23 and due process would not require an extraordinary expenditure of effort and expense to *identify* individual class members, individual and actual notice is mandatory when, as here, names and addresses are in fact made available by one of the parties.

High constitutional principle is demeaned by the cynical argument that notice pursuant to paragraph (c)(2) is unimportant in this case because no rational person, whatever the reason, would wish to assert an individual claim (Petr.'s Br., p. 32).* Notice of a class determination serves other and perhaps more important functions than merely providing an opportunity to opt-out and prosecute an individual claim; notice is indispensable to the fair and efficient adjudication of a class action.

The adequacy of the representation afforded the absent class members by the plaintiff is, as petitioner puts it, "the hallmark of due process" (Petr.'s Br., p. 30), and Rule 23 accords to each member of a (b)(3) class the right to determine that question for himself. Each member of the

* The absence of individual notice to all identified class members cannot be justified in this case, as petitioner suggests (Petr.'s Br., pp. 31-32), on the grounds that the statute of limitations has expired. Plaintiff has not disclaimed any intent to amend his complaint to seek damages for the period subsequent to the commencement of this action, nor has he disclaimed future reliance upon the doctrine of "fraudulent concealment" to toll the statute of limitations. Nor could he appropriately do so consistently with his obligation to protect the potential claims of those he seeks to represent, absent notice to the members of the class that petitioner was, or sought to be, their representative.

class has the right to consider the adequacy of his representation in determining whether to remain a member of the class and, also, in determining whether to appear individually, or with other like-minded class members, through counsel of his or their own choosing and actively participate in the prosecution of the case. *Greenfield* v. *Villager Indus., Inc., supra* at 833; *cf. Mullane* v. *Central Hanover Bank & Trust Co., supra* at 314; *Arey* v. *Providence Hospital*, 55 F.R.D. 62, 71 (D.D.C. 1972). The consequence of denying each class member that right might well be to render the resulting judgment unenforceable against him, *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and would frustrate the purpose of the amended Rule 23 to eliminate the problems of "one-way intervention" which made the former rule so inequitable and ineffective. Advisory Committee's Note, 39 F.R.D. at 105.

Class actions should be so administered by the District Court that class members are given full opportunity to evaluate the adequacy of their representation and they should be encouraged to undertake such a function.* It is not the function of the District Judge to goad the class representative and his counsel to an adequate standard of performance; even a District Judge with all the wisdom of a Solomon would find it difficult to do so without creating the impermissible impression that the Court was more the champion or advocate of the class than an impartial tribunal for the fair adjudication of the controversy.

We do not suggest that the initial notice could or should contain all of the information necessary for appraisal by

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* *See Air Lines Stewards Local 550* v. *American Airlines, Inc.*, 455 F.2d 101, 108 & n. 17 (7th Cir. 1972); *Arey* v. *Providence Hospital, supra. But cf. Gonzales* v. *Cassidy*, 474 F.2d 67, 76-77 (5th Cir. 1973).

laymen of the adequacy of representation. But at the very least, the notice must inform the class member that a lawsuit is pending which will adjudicate his rights unless he elects otherwise, give him the opportunity to follow the litigation and permit him or his counsel to determine then or later that, for example, the interests of certain members of the class are so different that sub-classes represented by separate counsel should be created, or that additional counsel (or claimants) are necessary to protect the interests of some or all of the class. It strains credulity too far to suggest that counsel for the plaintiff will be alert to such differences in interest and will make such proposals to the Court when the effect would be to reduce drastically his counsel fees in the event of settlement or recovery.

A failure to provide individual notice to all identifiable class members at the outset of the litigation equally undermines the objective of Rule 23 to avoid multiplicity of suits through an adjudication in a single forum which is binding upon all members of the class. The inadequate notice ordered by the District Court in this case would expose the parties to subsequent challenges to the binding effect of the judgment by dissatisfied class members after years of expensive litigation had been concluded. In reality, the District Court would have sanctioned a return to the discredited practice of "one-way intervention": if the defendants are held liable, the class members can accept the benefits of that decision; but if defendants prevail, or the scope or amount of liability is deemed inadequate, the absent class members might have a ready vehicle for challenging the judgment.

We submit that Judge Medina correctly concluded that the District Court's proposal to give individual notice to

less than .3 of 1% of the class members whose names and addresses were known, and otherwise to rely upon notice by publication, was "a totally inadequate compliance with the notice requirements of amended Rule 23" (A353).

Even if this action could properly be maintained as a class action under subsections (b)(1) or (b)(2), as petitioner asserts (Petr.'s Br., p. 36)—a conclusion with which we do not agree (*see supra* at 13-14)—it is unthinkable that the rights of absent parties could be adjudicated without their knowledge when their names and addresses are known. For example, where injunctive or declaratory relief is sought which could affect thousands of people in significant ways, surely those who would be affected must be given the opportunity to shape the presentation of their case or express their views as to the precise nature of the relief requested. It would be naive to assume that one private plaintiff or organization can discern what is best for and desired by all. The claimed beneficiaries of the litigation might well have divergent interests as to the precise corrective action which should be required. Those whose lives or rights will be affected deserve an opportunity to be heard if they so desire.

Petitioner and some of the *amici* who support him appear to misunderstand the Court of Appeals' decision as to which party should ordinarily bear the expense of giving notice to the class. The panel did *not* hold that in every case, regardless of the circumstances, the plaintiff must bear the expense of notice (*see* A351 & n.5). All the Court held is that ordinarily the expense of notice must be advanced by the party who initiated the class action, particularly if he is unwilling or unable to post a bond sufficient to insure that his adversary will be reimbursed for the expenditure if the

adversary ultimately prevails on the merits. The District Court here assessed ninety per cent of the cost of notice against the defendants, even though it was undisputed that the amounts so assessed would not be recoverable should the defendants ultimately prevail. Patently, this would be an unjustifiable seizure of the defendants' property without due process of law.

In the final analysis, petitioner's contention is that defendants should be required to finance litigation against themselves. Nothing in the Rule or in its history in any way suggests that such was this Court's intention or that this could be considered an acceptable method for the fair adjudication of a controversy.

III.

Conclusion.

As Judge Medina observed, expansive interpretations of the amended Rule 23 in the lower federal courts have had the result that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree." (A371)

In early 1971, a Special Committee of the American College of Trial Lawyers undertook to examine docket entries in all 29,693 cases brought in the United States District Court for the Southern District of New York during the five and one-half years from July 1966 to the end of 1971.*

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* Commencing only recently, and since June 30, 1972, the Administrative Office of the United States Courts has been collecting statistics on class actions. Those statistics reveal that a total of 2,654 class action litigations were filed during fiscal year 1973 (151 in the Southern District of New York) and there was a total of 3,756 such cases pending in all of the federal district courts (523 in the Southern District of New York) as June 30, 1973. 1973 Annual Report of the Director, Administrative Office of the United States Courts, pp. II-42 to II-49, Tables Nos. 36-38 (Prelim. Report).

That examination confirmed what bench and bar had already recognized out of their daily experience: Amended Rule 23, as applied in the lower courts, has imposed a crushing burden upon the federal judicial system.

Examination of docket entries in the Southern District of New York identified 1,339 class actions brought during the five and one-half year period, of which 410 were brought in 1971.* The burden upon the courts is far greater than mere numbers would indicate, for class actions tend to be complex and protracted antitrust and securities cases which demand disproportionate attention. Attempts by plaintiffs and their counsel to represent massive classes have become increasingly common. Thus, complaints have been filed on behalf of all subscribers to business telephones in New York County, all credit card holders similarly situated, all consumers of gasoline in a given state or states, all home owners in the United States and even all people in the United States.**

Moreover, the experience of both bench and bar in many massive class actions has confirmed Judge Lumbard's conclusion (in dissent from the initial decision of the Court of Appeals in this case) that all too often, "the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them" (A134).***

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* The number of class actions identified by examination of docket entries is substantially less than the number actually brought, since a class action would not be so identified on the docket unless a motion had been filed relating to class action status. American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* 13 (1972).

** *Id.* at 6.

*** Experience suggests that many of the class members on whose behalf class actions are purportedly brought have little or no interest

The view of Rule 23 espoused by petitioner and the *amici* who support him would add intolerably to the present workload of the District Courts and would do so at the expense of injustice to litigants who would become embroiled in these monstrous cases. Contrary to the assertions made by several of the *amici* who support petitioner, the decision of the Court of Appeals would not affect in any significant way the efforts of those who seek by litigation to vindicate the civil rights of the underprivileged. After all, this Court's

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in asserting their claims even after settlement when they can share in the recovery merely by filing a simple proof of claim form. The realities of class action damage litigation have thus, as Judge Weinfeld recently observed, raised a substantial question as to whether the Rule "has really achieved its promise, or rather whether it has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." *Free World Foreign Cars, Inc.* v. *Alfa Romeo S.p.A., supra* at 30. For example, in *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1384-85 (S.D.N.Y. 1972), written notice of the settlement was mailed to 89,000 class members, but only 14,156, or 15%, replied. However, counsel for the class representative sought attorneys' fees of $2.5 million, and was awarded $1.5 million. *Id.* at 1390, 1392. Similarly, a review of the docket in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971), reveals that notice of the settlement was sent to 21,291 non-governmental class members, but only 1,716 responded: 976 of those persons opted out of the class and only 740 (or approximately 3%) of the class members filed claims. Notice was also sent to 1,045 governmental bodies of which approximately 8% filed claims, 231 opted out and the others did not respond. In fact, 414 governmental agencies which could have shared in the settlement fund without even filing a claim notified the District Court that they did not wish to participate. Despite the lack of interest in the litigation demonstrated by the members of the class, the attorneys for the class were awarded fees of $6 million. *See also Lindy Bros. Bldrs., Inc.* v. *American Radiator & Standard Sanitary Corp.*, 341 F.Supp. 1077 (E.D. Pa. 1972) (attorneys' fees of approximately $2.2 million received by the class representatives' counsel in connection with a $26 million settlement), *rev'd*, —— F.2d ——. Docket Nos. 72-1647/72-1648 (3d Cir. October 31, 1973); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969) (attorneys' fees of over $5 million received by the class representatives' counsel in connection with a $22,175,000 settlement).

landmark civil rights decisions were *not* rendered in class actions and did not depend in any way upon Rule 23.*

The Court of Appeals held correctly that the case was unmanageable, that it could not be transformed into a manageable action by any notion of "fluid class recovery" and that Rule 23 and the Fifth Amendment require actual notice, at petitioner's expense, to those members of the class whose names and addresses are known.

Respectfully submitted,

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December 28, 1973

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* *E.g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

** Members of the Committee on Rule 23 and Multidistrict Litigation of the American College of Trial Lawyers.

SUPREME COURT, U.S.
DEC 28 1973

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-203

MORTON EISEN, On Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on The New York Stock Exchange Similarly Situated,

Petitioner,

vs.

CARLISLE & JACQUELIN, *et al.*,

Respondent.

On Writ of Certiorari From the United States Court of Appeals for the Second Circuit.

Motion for Leave to File Brief Amicus Curiae, and Brief for the Amicus Curiae Southern California Edison Company.

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IN THE

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CARLISLE & JACQUELIN, *et al.*,

Respondent.

On Writ of Certiorari From the United States Court of Appeals for the Second Circuit.

Motion for Leave to File Brief Amicus Curiae, Urging Affirmance.

Southern California Edison Company (hereinafter referred to as Amicus Edison), pursuant to Rule 42 of United States Supreme Court, hereby respectfully moves this Court for leave to file a brief *Amicus Curiae* urging affirmance of the decision of the United States Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin* (2d Cir. 1973) 479 F.2d 1005. The consent of the parties to file such a brief has been sought and refused by Counsel for the Petitioner.

Southern California Edison Company is a privately owned public utility engaged in the production and distribution of electrical energy in Southern California and other western states. As such Amicus Edison is involved in environmental class action suits instituted by private individuals to recover money damages in both the State and Federal Courts. One such action presently pending is *Richard Carlson, Norman Rosen, Donald Fulmer, William Hirchag,* and *Lyman Rich on Behalf of Themselves and All Other Persons Similarly Situated v. Southern California Edison Company,* Los Angeles County Superior Court Number 987456. The outcome in the instant case will determine the pretrial procedures with regard to the prerequisites of maintaining a class action including notice, manageability, and the determination as to whether there are common questions of law or fact as well as the appropriate use, if any, of the concepts of the "mini-hearing" and "fluid recovery".

Thus, the issues raised in the *Eisen* case are integral to the prosecution and defense of class action lawsuits and should only be determined after consideration of complete briefing of the questions presented. The Circuit and District Courts have dealt with this case primarily in terms of the notice requirements and which party is to bear their cost. However, as indicated above, the implications and effects of the Circuit Court decision reach to every corner of the prerequisites to maintenance of a class action. Furthermore, no party to this action is directly concerned with the effects of

the Circuit Court decision on environmental class actions seeking money damages.

The brief of Amicus Edison analyzes, the issues raised in the *Eisen* case in regard to environmental class actions rather than class actions based upon consumer protection or anti-trust legislation. In addition, it deals in depth with the concepts of "fluid recovery" and the "mini-hearing" and the issues of manageability, common questions of fact or law, and notice. Briefing with regard to environmental class actions brought for money damages is integral in the instant case in that, as more fully set out in the brief of Amicus Edison, such actions are uniquely concerned with the issues of notice, manageability and common questions of fact or law raised by the case now before the Court. This is particularly true because plaintiffs in environmental class actions tend to be difficult to identify and locate, their damages tend to be diverse in amount and different in kind and the issues of fact and law tend to vary with regard to the proof of proximate cause as well as damage.

Amicus Edison respectfully urges that no decision in the instant case should be reached without consideration of its effect upon environmental class actions seeking money damages. The brief of Southern California Edison Company examines the issues raised by the *Eisen* case in light of environmental class actions for money damages pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Wherefore, Southern California Edison Company respectfully requests this Court permit it to file the brief *Amicus Curiae* submitted herewith.

Respectfully submitted,
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-203

MORTON EISEN, On Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on The New York Stock Exchange Similarly Situated,

Petitioner,

vs.

CARLISLE & JACQUELIN, *et al.*,

Respondent.

On Writ of Certiorari From the United States Court of Appeals for the Second Circuit.

Brief of the Amicus Curiae Southern California Edison Company.

Introduction.

Southern California Edison Company (hereinafter referred to as Amicus Edison) is a privately owned public utility engaged in the production and distribution of electrical energy in Southern California and other western states. As such Amicus Edison is involved in environmental class action suits instituted by private individuals to recover money damages in both the state and federal courts.

Eisen v. Carlisle & Jacquelin, the case now before this Court, is different than environmental class action suits instituted by private individuals to recover money dam-

ages in factual context, legal basis and the legal and social purpose or philosophy intended to be implemented by the class action procedure. Thus, the issues raised in the instant case must be carefully examined as to their legal and practical effects and considerations in private environmental money damage class actions. As is more fully set out later in this brief submitted by Amicus Edison, the effects with regard to notice, the mini-hearing, fluid recovery, and manageability are of particular concern in light of the constitutional protections of due process.

I.

The Factual Context, Legal Basis and Social Purpose of the Type of Class Action Prosecuted in the Instant Case Differs Markedly From That in Environmental Class Actions Which Seek Money Damages for Individual Claims.

Eisen v. Carlisle & Jacquelin is a lawsuit instituted by an investor on behalf of himself and other odd-lot stock investors against major odd-lot dealers and the New York Stock Exchange. While the number of members of the class is extremely large and has been estimated at 6,000,000 members, 2,250,000 can be easily identified and an additional 250,000 or more members participated in listed transactions which are identifiable.[1] Furthermore, damages are mathematically computable assuming liability. Each individual odd-lot transaction has an average odd-lot differential of $5.18. Assuming a 5% overcharge the recovery is $1.30, and when trebled $3.90.[2]

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[1] *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1009 (2d Cir.), cert. granted, 42 LW 3226 (1973).

[2] *Eisen v. Carlisle & Jacquelin, supra* at 1010.

By contrast environmental class actions are uniquely susceptible to widely distributed, largely undefined classes with a numerical membership vast in comparison to that in the *Eisen* case. Environmental class actions have sought reparations on behalf of "all of the people in the United States," including "those yet unborn", "municipal taxpayers", and "residents" of a state or states, or otherwise defined large geographic areas.

Such actions will ordinarily fall under Rule 23(b)(3) of the Federal Rules of Civil Procedure since the risk of incompatible adjudications under Rule 23(b)(1)(A) is minimal and the likelihood of the claims of individual members disposing of or substantially impairing the interests of other members, not members of the class pursuant to Rule 23(b)(1)(B) is small. Neither do environmental class actions seeking money damages tend to be appropriate under Rule 23(b)(2) in that this subsection of the Rule is inapplicable where the appropriate relief relates predominately to money damages. Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 102 (1966); see also *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968).

Thus, the prerequisites to maintenance of a class action outlined in Federal Rules of Civil Procedure 23(b)(3) are of vital significance to environmental class actions seeking money damages.

Rule 23(b)(3) requires that the questions of fact or law predominate over questions affecting only individual members and that a class action be the superior available method for the fair and efficient adjudication of the controversy. Federal Rules of Civil

Procedure 23, subd. (b), subsec. (3). In that regard, Rule 23(b)(3)(d) requires that the difficulties of manageability be assessed. Furthermore, with regard to class actions pursuant to Rule 23(b)(3), Rule 23(c)(2) requires the best practicable notice under the circumstances to members of the class including individual notice to all members of the class who can be identified through reasonable effort.

Embodied in the above recited requirements of class actions pursuant to Rule 23(b)(3) are certain concepts of integral concern with regard to environmental class actions. These concepts are carefully analyzed as they relate to environmental class actions for money damages in the subsequent sections of this brief. Specifically, the concepts to be dealt with are those of the mini-hearing, notice, manageability and the issues of predominance of common questions of fact or law, fluid recovery and damages and their interrelation.

As recognized by the Advisory Committee's Note to Revised Rule 23, each requirement of Federal Rule 23 and each concept embodied in that Rule, particularly with regard to Rule 23(b)(3) must be applied in a manner consistent with the protections of the Due Process Clause of the Fifth Amendment to the United States Constitution accorded both plaintiffs and defendants. Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 107 (1966); 28 U.S.C. Section 2072.

II.

The Constitutional Protections of Due Process of Law Require That Any Order Issued Pursuant to Rule 23(c)(1) Be Conducted in a Hearing Identical to That of a Trial Where Evidence Is Taken, Testimony Is Given, Witnesses Are Cross-Examined, Findings Are Rendered and the Order Then Issued Is Appealable.

Much of the discussion in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), (hereinafter referred to as "*Eisen III*") deals with an impact of Rule 23(c)(1) at the time which the court must determine, in some manner, whether an action may be maintained as a class action or not. This concern is shared by Amicus Edison in the area of environmental class actions against public utilities such as itself. In rejecting the concept of the so-called mini-hearing the court in *Eisen III* stated at page 1015:

> But neither in amended Rule 23 nor in any other rule do we find provisions for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

It thus appears that the Court in *Eisen III* arrived at its decision based upon two factors, to wit, an inability to find the mechanism for hearing in Rule 23 itself and a fear that any mini-hearing would be highly prejudicial to the parties because of the absence of procedural safeguards that are applicable to full scale trials on the merit.

Amicus Edison fully agrees with the result of *Eisen III* based on the facts that were present there. However, the most important objection to a mini-hearing, the lack of procedural safeguards embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, can be overcome. The terminology mini-hearing is unfortunate because it presupposes that such a hearing requires a lesser degree of procedural protection. A first step in the right direction might be to discard the nomenclature "mini" and recognize the fact that any hearing which is held under Rule 23 must be carried on in the same manner as a regular trial.

While the Court in *Eisen III* is correct in saying the language does not specifically provide for a hearing, there is to be no other practical way for a court to issue an order determining whether an action brought as a class action should be so maintained. Rule 23(c)(1) makes it mandatory for the trial court to make such a determination. If a conscientious effort is made to satisfy this requirement the holding of a hearing is a necessary step in not only satisfying the requirement, but providing the protections of due process for both plaintiffs and defendants. It would seem obvious that under Rule 23(c)(1) something more is contemplated than the trial court merely perusing the pleadings to satisfy itself that the allegations are sufficient to qualify the action as a class action.

The need for a full hearing in those actions under Rule 23(b)(3) is even more compelling than in class actions brought under Rule 23(c)(1) or 23(b)(2) due to the fact that in a suit under Rule 23(b)(3) not only must the provisions of Rule 23(a)(2) be satisfied, but also those of Rule 23(b)(3). Thus, an action under Rule 23(b)(3) must have predominant questions of fact or law common to the class and also a *finding* that "the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members . . ." (emphasis added). Federal Rules of Civil Procedure Rule 23, subd. (b), subsec. (3).

The practical problem of satisfying Rule 23(a)(2) and Rule 23(b)(3) is even greater in an environmental action seeking money damages because the interest of the individual claimants are so diverse. For example, an environmental class action seeking money damages that involves air, water or radiation pollution could well cover an extremely large geographical area and affect a great number of people. The need for establishing proximate cause for any injury suffered and damages flowing therefrom for each individual would be distinct and different requiring each such person to prove at least these two factors himself. The task of determining whether or not such an action is properly a class action seems to demand a hearing of some magnitude.

The Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 103, which discussed the 1966 changes to Rule 23, recognizes the problem presented by Rule 23(b)(3). The Committee stated:

> The court is required to find, as a condition of holding that a class action may be maintained under the subdivision, that the questions com-

> mon to the class predominate over questions affecting individual members. It is only where this predominance exists that economy can be achieved by means of the class-action device.

The Committee further recognized that:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.

Despite its awareness of the problem, the Committee made no suggestion as to how the trial court would satisfy the above referred to stringent provision. It is the suggestion of Amicus Edison that the only fair and proper method by which the trial court can issue an order regarding the propriety of a class action is to hold a hearing in which all the protections of due process of law are employed and recognized.

The decision in *Eisen III*, in addition to disapproving the mini-hearing, expressed considerable concern over the scope of any such hearing. A similar result, that the preliminary hearing on the merits was improper, was reached by the Fifth Circuit in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971). *Eisen III* and the *Miller* case reject the procedure used in *Dolgow v. Anderson*, 53 F.R.D. 664 (1971). The court in *Dolgow v. Anderson, supra*, held what appears to be a very complete hearing. It received evidence and allowed examination and cross-examination of witnesses and argument of counsel in order to determine whether or not the possibility of recovery on the merits was so slight as not to justify the enormous expense of the

case proceeding as a class action. The Court in *Dolgow v. Anderson, supra,* also discusses the burden of proof required of plaintiff in order for the court to make its determination. The Court held that a higher burden of proof is required than that which is necessary on a motion seeking a summary judgment.

While *Eisen III* indicates that the so-called hearing should not be a trial on the merits or a hearing as to who should pay for notice, it does seem to suggest that some form of hearing be held to answer that question and whether the requirements of Rule 23 are met. *Eisen III, supra* at page 1016. Amicus Edison urges, however, that environmental class action suits for money damages are considerably different than those brought under antitrust laws and may require broader scope of consideration at a hearing to determine class propriety.

The following guidelines are suggested as the proper scope of the hearing to determine the propriety of a class action where an environmental class action under Rule 23(b)(3) is brought. First, the scope of any such hearing should be as broad as necessary to determine if the requirements of Rule 23 are met even if this involves making some ruling on the merits of the action. For example, a class action for damages based upon the release of pollutants into the air could raise a problem with regard to liability where the plaintiffs are within a very large geographical area. In order to determine whether or not there are common questions of fact or law, the court may be required to establish whether or not the amount of pollution had a significant effect upon any particular area within the greater boundaries and was a negligent act or a violation of law. In coming to its conclusion, the trial court could find that in a particular area within the broader geo-

graphical boundaries, due to the small amount of actual pollutants emitted as a result of the acts of the defendant, the pollution was so insignificant that there was no proximate cause, damage or negligence. This would be a determination of propriety of the class, but also one as to liability on the merits. This broad scope of inquiry further points out the need for due process protection at such a hearing.

There would appear to be no justifiable reason why the determinations required to be made by the trial court under Rule 23(a), Rule 23 (b)(3), Rule 23(c)(1), Rule 23(c)(2), and Rule 23(d) should not be arrived at without a hearing that affords the full protection of due process of law. Each and every decision made pursuant to the above referred to subdivision of Rule 23 has equal impact and as stated in *Eisen III* ". . . will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable." *Eisen v. Carlisle & Jacquelin, supra* at 1015.

In fact, those orders which are issued under Rule 23(d) may well have the most serious impact upon parties to a class action in that that subdivision of the Rule contemplates that the nature and scope of the action may change from time to time. Such flexibility is undoubtedly desirable but places a considerable burden on any party to protect or preserve his position in the event an appeal is subsequently deemed advisable.

Further, the burden upon the trial court in issuing orders under Rule 23(d) is considerably increased in a Rule 23(b)(3) situation since the court is under a greater duty to protect members of the class and to see that the action is conducted fairly for all parties. That

such is the case is recognized by the language of Rule 23(c)(2) which requires a higher degree of notice than is required in Rule 23(b)(1) and Rule 23(b)(2) actions. Furthermore, under Rule 23(b)(3), with its specific stringent prerequisites to maintenance of a class action, the trial court must also find that the questions of fact or law common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The determination these requirements are not met precludes subsequent orders under Rule 23(d).

Other issues attached to use of a hearing are whether or not findings should be prepared by the court in order to support the result of the orders and the appealability thereof. The necessity for findings to support an order would appear to be imperative so that the parties to an action can fully understand the issues and effects of an order which is rendered. This problem was discussed in *Interpace Corporation v. City of Philadelphia,* 438 F.2d 401 (5th Cir. 1971), wherein the majority of the Court felt that the word "finds" in Rule 23(b)(3) did not mean that formal findings were necessary. Amicus Edison urges that the dissent in *Interpace Corporation v. City of Philadelphia, supra* at 406 properly analyzes not only the inapplicability of Rule 52(a) but also the proper rationale for requiring findings to support an order under Rule 23(b)(3). There Judge Adams states:

> "A primary reason for such extra requirements is that Rule 23(b)(3) now makes binding on all class members a decision which formerly—under the designation of a 'spurious' class action—might bind only the actual litigants. [Footnote exclud-

> ed]. The possibilities under the Rule for extremely broad geographical, temporal and substantive actions make imperative a more stringent definition of 'class,' and justify placing a greater responsibility on the trial court than existed prior to 1966. [Footnote excluded]. Nor can we disregard the expanding use of the class action device in important litigation matters affecting substantial portions of our citizenry. Because of the dangers for abuse, therefore, courts of appeals should insist that the requirements of Rule 23(b)(3) be met in each case."

The argument of the Court quoted above further points out the fact that orders either allowing or denying class actions which result from proper hearings should be appealable. Also, footnote 1 in *Eisen III, supra* at page 1007, recognizes the impact of a decision on the propriety of an action as a class action. As the application of amended Rule 23 is determined by use and appellate decision, it would seem imperative that there be a faster method of determining questions of propriety of class than to have an action proceed completely through trial and then a decision that that action was not properly brought only after considerable effort and great sums of money have been expended to the detriment of all parties. In order to have an effective appeal which will be of significance, findings are even more imperative. The example given by the Advisory Committee, 39 F.R.D. 69, 103, illustrates the problem.

> . . . [A] fraud perpetrated on numerous persons by use of similar misrepresentations may be an appealing situation for class action, and it may remain so despite the need, if liability is found, for

> separate determination on damages suffered by individuals within the class. On the other hand although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the misrepresentations made or the kinds or degrees of reliance by the persons to whom they were addressed.

If a class action were brought in the situation suggested above, an order of the court that the class action was properly brought would have little significance and fail to present sufficient information for any appellate court to determine whether or not the trial court was correct or in error. Findings by the trial court as to whether the misrepresentations were similar would, at the very least, be of assistance to the appellate court in making its decision. For the above reasons, Amicus Edison strongly urges that findings and appealability from orders rendered under Rule 23 be required and that the procedure employed for appeal be that of 28 U.S.C. 1292(a).

Lastly, there remains the question of who has the burden of proof in any hearing under Rule 23. Logically, the burden of showing that the provisions of Rule 23 are satisfied should be borne by the plaintiffs. Consistent with this approach is the decision of *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 540 (1972) at Footnote 1, wherein the court stated:

> In any class action, the plaintiff has the burden of showing the provisions of Rule 23 Fed. R.Civ.P., are satisfied. *Philadelphia Electric Company v. Anaconda*, 43 F.R.D. 452 (E.D.Pa. 1968); *City of Philadelphia v. Emhart Corp.*, 50 F.R.D. 232 (E.D.Pa. 1970). In this case the parties agreed

that the plaintiffs must satisfy the requirements of both Rule 23(a) and 23(b)(3) Fed. R.Civ.P., in order to maintain this class action. Rule 23(a) requires that (1) the class is so numerous, joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

Rule 23(b)(3) requires in addition to satisfying the requirements of 23(a), the court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Amicus Edison urges that such an approach is totally fair inasmuch as plaintiffs are the proponents of the class nature of the action and have initiated it. It would be an absurd situation wherein defendants would be required to go into a hearing with the presumption that an action is properly brought and then be required to disprove the class nature of the action in light of the various factors which are to be taken into consideration by the trial court. Thus, it is urged that the position taken by the District Court in *Bel Air Markets v. Foremost Dairies, Inc., supra,* be employed in all hearings wherein there is the question of not only propriety of the class, but also adequacy of notice, a subject to be discussed below.

III.

The Concept of Fluid Recovery Is Inappropriate as Applied to Environmental Class Actions.

The concept of fluid recovery and its use to overcome problems of manageability decided in *Eisen III, supra,* are problems of serious concern not only in the *Eisen*-type factual situation, but even more so in environmental class actions for damages. Although this topic is treated separately and apart from the hearing question and the issue of notice discussed below, Amicus Edison does not intend thereby to suggest that the problem of damages and who is entitled to damages is exclusive of the hearing problem or the notice quetion. The use of the fluid recovery concept has a profound impact on the other two areas inasmuch as any hearing held to determine whether there are questions of fact or law common to the members of the class which predominate over questions affecting only individual members and the feasibility of providing adequate notice to all members of the purported class could hinge upon the concept of fluid recovery and general manageability of the action.

As employed in *Eisen III, supra,* and *Dolgow v. Anderson, supra,* fluid recovery is more than a concept of damages. It is a method whereby, due to the nature of the action, damages are easily ascertainable, but those to whom the damages are to flow are not. The concept allows for the creation of a fund composed of damages which are purportedly owed unascertainable plaintiffs and such fund is to be used for the benefit of the class in some manner. By allowing such an accumulation of the fund, the problems of determining whether or not there are common questions of fact

and how adequate notice is to be given to the members of the class under Rule 23(b)(3) can be improperly brushed aside in order to allow the action to proceed as a class action. The temptation to use the concept of fluid recovery in consumer cases, stockholder suits, securities violations and antitrust actions is unfortunately great due to the ease in some instances of determining damages by a formula. Such an approach totally ignores the actual problem suggested by the Advisory Committee's notes, *supra*, page 103.

It is submitted that the concept of fluid recovery, regardless of applicability in other situations, has no place in class actions under Rule 23(b)(3) based upon environmental causes of action against public utilities such as Amicus Edison because there are wholly different considerations involved. To employ the concept of fluid recovery is totally inappropriate because the various problems which fluid recovery is used to solve are not solved.

In an environmental class action seeking damages from a public utility under Rule 23(b)(3), the creation of a "fund" or "fluid recovery" will not result in the social benefit often attributed to fluid recovery. Generally speaking, environmental class actions have their greatest impact where an activity is prohibited or restricted with the absence of such activity inuring the benefit of the class. Further, because of the individual nature of damages that necessarily is a part of a class action any summary computation of them has a *res judicata* effect upon the whole class and may well be a denial of due process to the individual members. It will also be most awkward if not impossible to fairly administer any fund resulting from an environmental class action inasmuch as the damages to each

member of the class are of such an individual nature and expenditure of the fund for the benefit of the class as a whole is more esoteric than factual.

In *Dolgow v. Anderson, supra,* there was considerable discussion as to the prophylactic effect and social benefit that results from permitting a class action employing the concept of fluid recovery. One of the social justifications advanced was that the imposition of damages by way of a substantial fund prevented unjust enrichment to the offending party. Such a concept has no application in an environmental class action against a public utility. Unlike the purely entrepreneurial business enterprises involved in *Eisen* or *Dolgow*, a public utility such as the Southern California Edison Company, *Amisuc* herein, although a profit-making corporation, has its operation and revenue controlled by public agencies such as the Public Utilities Commission of the State of California. In order to obtain any increase in revenues, it is necessary and required that approval from that agency be obtained by the public utility. Thus any profits earned come under the close scrutiny of an agency which exists for the purpose of protecting the public.

Still more important in this regard is the fact that the mode of operation of a public utility is determined by factors beyond its control. For instance, the types of resources employed in order to produce energy are determined by the state of the art. No rational reason exists for imposing penalties upon a public utility for its mode of operation when the state of the art has a limited development. For example, if nuclear energy were employed to produce electrical energy and other forms of resources were not available, it would appear grossly unfair to penalize the public utility for pollution

of the environment in that the state of the art would be such that pollution was unavoidable. The social benefit of the production of electrical power, not only to the potential class, but society as a whole, is so great that the utility should not be tethered with the imposition of punitive judgments while satisfying social needs.

Additionally, in light of the present energy crisis, need for a public utility producing energy for the existence of human beings fulfills a much broader social need and affords a greater benefit than the operation of brokerage houses dealing in odd-lot purchases of stock. Thus, if overall social benefit is one of the bases for justifying the concept of fluid recovery, all factors weigh against the use of such recovery in situations wherein public utilities are involved.

Ironically, if the concept of fluid recovery is employed in a class action against a public utility, the very people who purportedly benefit from the use of such fund, may in actuality shoulder the burden of the cost of any such judgment. Traditionally, a public utility burdened with a judgment can reasonably be and is allowed to characterize such judgment as a legitimate cost of operation and thereby seek an adjustment of its rates from the consumer in order to recoup the loss of funds resulting from the judgment. Assuming that a fund were created resulting from an Environmental class action against a public utility, such a fund undoubtedly would be used for the benefit of the utility's consumers who would then pay by an increase in rates for this benefit. It would seem that a more realistic approach to the whole problem would be found in enjoining the offensive activity and leaving revenues avail-

able for reinvestment to improve the state of the art. The ultimate effect of the use of fluid recovery with regard to a public utility would be to penalize the consumer rather than the offending corporation. Thus there would be none of the purported salutary effect as in the case of seeking retribution against a corporation.

In addition to the fact that the social benefit argument is inapplicable in justifying the use of fluid recovery in an environmental class action against a public utility, the further problem of unmanageability cannot be solved by the use of the concept. In environmental cases based upon such things as air, water or radiation pollution, the vastness of the physical area involved makes it impossible to easily determine damage as a whole as in those situations presented by *Dolgow v. Anderson, supra,* and *Eisen III, supra.* In a Rule 23(b)(3) situation, there is no shortcut which can be employed to satisfy manageability. As pointed out by the Advisory Committee remarks, *supra* at 103, there is the danger of what might be called a class action that is really nothing more than a "mass accident" wherein there are injuries to numerous persons resulting from one incident. The concept of fluid recovery actually contravenes the very premise upon which a Rule 23(b)(3) action is based. For instance, under Rule 23(b)(3)(d) the difficulties likely to be encountered in the management of a class action are a specific factor to be considered. The use of fluid recovery in order to overcome this serious consideration merely begs the question. If fluid recovery were permitted, there would be little necessity for the trial court to go through the exercise of attempting to give notice under Rule 23(c)(2) as is demanded by that subdivision and necessary to protect the rights of all the members of the class.

Another reason for the rejection of the use of fluid recovery is the fact that it would eliminate the necessity of proving proximate cause or legal cause by the individual members of the class to establish their rights under the suit. The proximate cause element is a vital factor that must be proved by each and every member of the class in order to justify recovery. Thus, the use of fluid recovery not only glosses over the manageability question, but one of the necessary elements in any suit for damages, proximate cause. In addition to the disadvantages placed upon a defendant by the use of the concept of fluid recovery, there is the danger involved for plaintiffs who are members of the class. The concept violates the individual plaintiff's right of due process by denying his right to litigate the cause as a result of the *res judicata* effect. This is especially true where he may not have received notice or adequate notice of the action. Such a danger is real and not at all fictitious because of the ease in which fluid recovery can be used to justify overcoming not only problems of manageability, but problems of notice. The concept has a tendency of lulling trial courts into a false sense of security, and rationalizing the lack of necessity to give extensive and comprehensive notice as required by Rule 23(c)(2). This point will be further discussed hereinafter with respect to notice.

If social ill demands that some remedy be available, it would seem that the most likely alternative

relief may be found in actions brought by governmental agencies employing the concept of *parens patriae*. Such an approach was recently applied in the case of *Maine v. Tamano*, 357 F.Supp. 1097 (1973), wherein the State of Maine was permitted in an environmental action to represent all its constituents. There are, of course, limitations on this concept in situations arising under the Clayton Act. See *Hawaii v. Standard Oil Company of California, et al.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Amicus Edison is in full agreement with the Court in *Eisen III, supra,* in rejecting the concept of fluid recovery because when reduced to its lowest common denominator, the trial court in the various actions applying the concept have acted unconstitutionally. Fluid recovery is not provided for in Rule 23(b)(3) and is an attempt to create a substantive rule of damages out of what is only a rule of procedure. Rule 23 as amended in 1966 does not impose upon trial courts the obligation of manufacturing manageability, but only that of determining whether those factors required exist in any action which is brought as a class action. The temptation to use the concept of fluid recovery where damages are easily ascertained should not be embraced especially in environmental class actions brought under Rule 23(b)(3) because of the substantial burden placed upon plaintiffs and defendants and the need to protect the interests of the parties.

IV.

The Requirement of Adequate Notice Evidencing Manageability of a Class Is Particularly Substantial in Any Environmental Class Action Brought Under Rule 23(b)(3).

The obligation of the trial court to satisfy the requirements of Rule 23(c)(2) in regard to notice to the class, raises many issues which, however break down into two general areas. First, who is to bear the burden of giving notice and second, the interrelationship between notice and manageability.

In a situation under Rule 23(b)(3) where an environmental action is brought against a public utility, the plaintiffs should be required to pay for notice. The reasoning in *Eisen III, supra,* is applicable in this situation because, as argued in *Eisen,* if the defendant who has been burdened with the payment of notice, should later prevail upon the merits, that defendant has no recourse to recover its costs from the plaintiff. This is especially true where the individual plaintiffs have a very limited interest in the lawsuit, and many of the members of the class are not located, due to the use of the concept of fluid recovery. This problem is very telling with respect to a public utility which is compelled to pay for notice and has no recourse for such a legal expense against the parties bringing the suit. Ultimately, the private public utility is compelled to recover its cost, if at all possible, because of its fiduciary duty to its stockholders, by passing that expense on to its consumers, through rate adjustments. This is patently unfair to the consumers who were never parties to the action, or in any other way involved in that they are forced to ultimately finance the expense of the specious lawsuit. Further, in an environmental

class action under Rule 23(b)(3), the argument that information with respect to the class is more available to the public utility is not true. This situation differs greatly from the case where the class is composed of consumers of the public utility, or the stockholders of a corporation who are regularly contacted by and whose existence is in the knowledge of corporation. Thus, there is no reason why there should be any departure from the rule of compelling plaintiffs to carry the burden of a lawsuit which they have brought. In the instance where a governmental agency is a plaintiff bringing a class action on behalf of its constituents, a strong argument also exists for compelling those constituents to bear the burden of such things as giving notice because the action is brought on their behalf.

A corollary and negative environmental effect also results where the public utility is compelled to pay for notice in an environmental class action, as this results in the diversion of revenue which could, and would, otherwise be employed to develop new energy sources. One of the major problems faced not only by public utilities, but the population as a whole, is the development of alternative and new sources of energy. Again, where there is a diversion of economic resources, the obligation of paying for everything falls upon the consumer through rate adjustments. Although rate structure has been recognized as being an environmental factor (See *United States v. S.C.R.A.P.*, 5 E.R.C. 1449) the effectiveness of class actions in order to affect rate structure by forcing increases in order to pay judgments is at best, rather remote.

The second issue with respect to notice, and its effect on manageability of a class action involves a number of considerations. The requirements under Rule 23 (c)(2) strongly demand that a comprehensive hearing on notice satisfying due process requirements be held for the protection of plaintiffs and defendants, as this requirement is an integral part of establishing whether or not a class action properly exists and the composition of the class. Class actions brought under Rule 23(b)(3), necessitate a very conscientious effort because the language in Rule 23(c)(2) requires the giving of not only individual notice, but also the best notice practicable under the circumstances. It is difficult to envision how such a stringent requirement can be satisfied without employing a hearing held under conditions where all the due process requirements are envoked inasmuch as the notice obligation is such a basic part of an action under Rule 23(b)(3).

Aside from the language found in Rule 23(c)(2), there remains another compelling reason for achieving the highest degree of notice to the class possible. This is because of the *res judicata* effect of class actions brought under Rule 23(b)(3), and the requirement of members of the class that they express their desire not to be bound by the result of the case. Members of the class not wishing to participate must take some affirmative action to "opt out." Unlike the old "spurious class action" situation, the ramifications upon members of the class are considerable. Due to this fact, no stone should be left unturned in seeking to give adequate and comprehensive notice to all members who may be affected. For this reason alone, it would appear necessary for the court to narrowly construe and apply Rule 23(b)(3) in determining whether or not a class

action may be maintained. Inclusion within a class also places other burdens upon members for failing to "opt out" such as being subject to discovery procedures, contempt proceedings, and costs should the case be unsuccessful. For these reasons, it would appear prudent for the courts to very narrowly construe those situations in which Rule 23(b)(3) may be employed.

As is suggested above, a full complete hearing should be undertaken by the trial court in order to deal with the notice requirements. It is here further suggested that during such a hearing, the form of notice, its contents, and who is to receive it must be determined. However, despite the completeness of such a hearing, the constitutional requirements of due process would still not be satisfied without the holding of another hearing in order to ascertain the adequacy of what had been done. This suggestion may give rise to the argument that there be various stages of notice; that is, the first notice which is given need not be as complete and comprehensive as a subsequent notice at which time, further considerations, and more knowledge about the action have been ascertained and additional plaintiffs have been disclosed. Such an approach is an equally fallacious attempt as the concept of fluid recovery to ignore the demanding requirements of an action under Rule 23(b)(3), and flies in the face of the mandatory obligation of the trial court to determine by order, as soon as practicable, whether the action may be maintained as a class action. To give anything but the most conscientious and complete notice possible in the first instance would amount to a derogation of the obligation established by Rule 23. The subsequent hearing, suggested herein and urged, is a method of perfecting notice, and in effect, also determining manageability.

The notice requirement is an integral part of manageability in a class action brought under Rule 23(b)(3). If adequate notice cannot be given, the only conclusion is that the action may not be maintained as a class action. As suggested previously, use of the fluid recovery concept is also merely a method of glossing over the inability to give adequate notice.

Conclusion.

For the foregoing reasons, Amicus Southern California Edison Company respectfully requests that this Court evaluate the *Eisen* case in light of the considerations unique to private environmental class actions seeking money damages.

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SUPREME COURT, U. S.

FILED

FEB 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR THE PETITIONER.

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PETITIONER'S REPLY BRIEF.

I.

INTRODUCTION.

Running throughout the defendants' brief and underlying all of their arguments is the suggestion that the conduct of the odd-lot dealers in jointly fixing the odd-lot differential was regulated by the New York Stock Exchange and approved by the SEC (*E.g.*, Resp. Br., pp. 13-16, 21, 76-77, 106). That theme is based on a state of the facts that simply does not exist. It is anchored to two entirely false premises:

> (1) that the Exchange in fact regulated the odd-lot differential in the period in suit, through "settled practice"; and
>
> (2) that both the Exchange and the SEC participated in the fixing of the odd-lot differential in 1951, and found it reasonable.

The facts are (1) that the Exchange did not regulate the odd-lot differential in any way whatsoever, either by practice or by rule; and (2) that neither the SEC nor the Exchange investigated or approved the increase in the odd-lot differential in 1951.

Defendants' version of the facts is unsupported by evidence. Plaintiff's version of the facts is fully supported not only by the undisturbed findings of the District Court,[1] but also by the findings of the SEC Special Study of the Securities Markets (1963).[2]

---

1. The Court of Appeals did not reverse the District Court's findings as erroneous, but held only that the findings did not properly bear on the issue of allocating the cost of notice.

2. The Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) (hereinafter cited as: Special Study) was introduced as Plaintiff's Exhibit 1 at the preliminary hearing before the District Court.

With respect to the claim of Exchange regulation of the odd-lot differential, the Special Study found:

1. "The Exchange has allowed the odd-lot differential to be established by the odd-lot firms themselves rather than by Exchange rule, apparently on the theory that a price differential as distinguished from a fee or commission is a matter for negotiation between the odd-lot firms and other member firms." (Special Study, pp. 199-200)

In 1941 the Exchange itself wrote to the SEC:

"The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100-share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change." (Special Study, p. 180)

2. "The New York Stock Exchange apparently is the only registered national securities exchange which does not attempt to regulate the amount of the odd-lot differential." (Special Study, p. 181)

3. "A duopoly dominating a large and important public business would seem a classic case for rate regulation, and the Exchange has clear statutory authority to regulate, yet it has failed to exercise its jurisdiction and thereby disavowed responsibility. Nor has the Commission ever formally exercised its authority under sections 11(b) and 19(b) of the Exchange Act

with respect to the differential or other aspects of odd-lot dealer activities." (Special Study, p. 200)

4. The Exchange did not approve the 1951 increase. "The New York Stock Exchange was informally advised of the proposal and Exchange officials reportedly expressed the view that the Exchange had no jurisdiction and [therefore] would not oppose the increase." (Special Study, p. 181). "A 1961 memorandum from the Exchange's Floor Department to the Board of Governors noted that, 'The records do not indicate that the increase was ever considered by the Advisory Committee or the Board of Governors of the Exchange.'" (Special Study, p. 181, n. 404).

The defendants' claim that the SEC approved the 1951 differential increase "after a two-day hearing" (Resp. Br., pp. 15, 76) is likewise utterly false. There was no such hearing, and no such approval.

The exhibit which defendants cite to establish the SEC "hearing" (Preliminary Hearing, Def. Ex. J) shows only an informal meeting attended by two members of the Commission *staff*, an assistant to the Commission chairman, and the attorney for the two odd-lot dealers. No evidence was offered or introduced, and no argument was made to the Commission itself. The result of the meeting was not SEC approval of the differential as reasonable (as defendants would lead the Court to believe), but merely a failure to object to the increase, based in large part upon the Commission's expressed doubt that it had jurisdiction to object. Special Study, p. 182.

Not until its letter to the Exchange dated June 16, 1966, did the SEC take any affirmative action to require the Exchange to regulate the odd-lot differential. Then, and only then, did the Exchange for the first time undertake such regulation.

Defendants' entire argument based on antitrust immunity[3] falls with the fiction that the Exchange and the SEC had in fact regulated the odd-lot differential prior to 1966. In the absence of regulation by rule or by genuine and active practice, the immunity issue is governed by this Court's decisions in *United States v. Borden Co.*, 308 U. S. 188 (1939), and *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 225-26 (1940),[4] and not by the cases cited by defendants.[5] In those cases the Exchange had actually exercised its regulatory powers, unlike the complete absence of regulation in *Socony*, in *Borden*, and in this case. In *Borden*, this Court held:

> "We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions'." 308 U. S. at 198.

Moreover, it has been clear since *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), that even where regulation has taken place, self-regulation by the Exchange is exempt from the antitrust laws "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U. S. at 357. In *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971), the Court denied the Exchange immunity, holding that any

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3. Significantly, no defendant pleaded immunity in its answer to the Complaint.

4. *Cf. Schechtman v. Wolfson*, 244 F. 2d 537, 539 (2d Cir. 1957).

5. Resp. Br., pp. 74-75.

"exemption must be based on a showing of true necessity." 433 F. 2d at 269.[6]

In this case it is inconceivable that an odd-lot differential artificially inflated by price-fixing is somehow a "true necessity" to making the Exchange Act work. Indeed, the defendants offer no explanation whatever why an excessive differential is needed to make the Act work. They have simply claimed immunity, *ipsi dixerunt.*

In this case the defendants not only fixed the price at which odd-lots were traded on the New York Exchange, but as the SEC Special Study found, also conspired to set the same differential on the regional exchanges, and coerced the Boston Exchange to increase its differential, despite its initial unwillingness to do so. Special Study, pp. 181-85.[7]

Defendants' statement that they acted "openly and under the scrutiny of the SEC and the Department of Justice" (Resp. Br., p. 21) gives an extraordinarily wrong impression, in light of the conclusions of the SEC Special Study and the strictures in the letter of Assistant General McLaren, upon which defendants rely.[8] The Justice De-

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6. *Thill* effectively overrules *Kaplan v. Lehman Bros.*, 371 F. 2d 409 (7th Cir. 1967), *cert. denied*, 389 U. S. 954 (Chief Justice Warren dissenting) upon which defendants rely.

7. By such conduct the defendant odd-lot dealers involved outsiders on other Exchanges in their price-fixing, thereby relinquishing any antitrust immunity they might otherwise have had. *Cf. Maryland & Virginia Milk Producers Association v. United States*, 362 U. S. 458, 472 (1960); *United Mine Workers v. Pennington*, 381 U. S. 657, 669 (1965).

8. The letter, in fact, states that:

> "Historically, the odd-lot differential rates have been fixed by agreement between Carlisle and DeCoppet, who together have put pressure on regional exchanges and others not to deviate from them" (Def. Exh. D, p. 2).

It also concludes that the defendants' "traditional propensity to resist technological change" was a deliberate policy designed to thwart competition (*Id.* at 3, 4). In summary, Mr. McLaren stated that in the absence of initiation of "affirmative Commission action" to require the automation of odd-lot trading, the Department would have to consider the "exercise of antitrust jurisdiction" (*Id.* 3, 5).

partments' decision in 1969 not to oppose a merger was in no way determinative of the rights of Eisen and the class as to price fixing during the period from 1962 to 1966.[9] It did not even amount to "consent" to the merger (Resp. Br., p. 44), nor did it commit the Department itself not to take action in the future. See 28 CFR, Chap. 1 § 50.6 (1968); *Blue Cross of Va. v. Commonwealth of Va.*, 176 S. E. 2d 439 (Va. Sup. Ct. 1970).

Antitrust immunity, in addition, is irrelevant to private enforcement of the Exchange Act. The record fully supports the District Court's findings and its conclusion that "plaintiff and the class he represents are more than likely to prevail at trial." (A289).

Despite defendants' extended discussion of "the substantive law", the District Court's findings of fact and conclusions of law regarding the defendants' antitrust and Exchange Act violations are not properly before the Court for review. The Court of Appeals did not reverse those findings or conclusions as erroneous, but rather held only that the findings did not bear on allocating the cost of notice. Moreover, the defendants have never raised the correctness of those findings and conclusions as a question presented for review, either in this Court or in the Court of Appeals.

Nevertheless, because defendants have repeatedly raised the issue in their Brief, the foregoing reply is in order.

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9. Indeed, the McLaren letter confirms that the abuses found by the Special Study continued through the remainder of the period in suit:

> "To summarize, our recent investigation of the operations of Carlisle and DeCoppet confirms the continued applicability of the Special Study's basic analysis and criticism of odd-lot dealing methods on the N. Y. S. E." (*Id.* at 5).

II.

NO UNDUE DIFFICULTIES ARE LIKELY TO BE ENCOUNTERED IN MANAGEMENT OF THE CLASS ACTION.

A substantial part of the defendants' brief is devoted to an issue that may never arise—"fluid class recovery" as a method of dealing with any residue of damages incapable of being refunded to individual class members. The District Court's view of "fluid class recovery" was necessarily inchoate and tentative, no more than a reference to a possible form of ultimate relief and wholly inappropriate for review at this early stage of the case.[10] By concentrating their argument on "fluid class recovery", the defendants have contrived to misconstrue and exaggerate the issue of manageability, ignoring the plain language of Rule 23.

An action may be maintained as a class action under Rule 23(b)(3) if the Court finds that common questions predominate, "and that a *class action is superior to other available methods* for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: . . . the difficulties likely to be encountered in the management of a class action." (Emphasis added). That is the only part of Rule 23 which refers to manageability. Manageability is thus not an issue as to the 23(b)(1) or (2) aspect of this case. See, *e.g., Bermudez v. United States Department of Agriculture*, — F. 2d —, 17 FR Serv. 2d 1153 (D. C. Cir.), *cert. denied*, 42 U. S. L. W. 3348 (December 10, 1973).

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10. The District Court held that ". . . the fluid class recovery *might* then be appropriate for distribution of the unclaimed remainder." (A217). See also Rule 23(d): ". . . The orders . . . may be amended as may be desirable from time to time."

Moreover, with respect to the Rule 23(b)(3) aspects of the case, "difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques. This perspective is particularly important . . . where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one." *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282 (S. D. N. Y. 1971), *mandamus denied sub nomine Pfizer, Inc. v. Lord*, 449 F. 2d 119 (2d Cir. 1971). *Cf. Wolfson v. Solomon*, 54 F. R. D. 584, 592 (S. D. N. Y. 1972) ("In fact, the class action is not only a superior method, it is often the only feasible one"). In this case defendants assert theoretical manageability problems, not in support of an alternative remedy, but to prevent any remedy at all. But even such theoretical "problems" are of far less magnitude than defendants assert.

First, 56 per cent of the class members' odd-lot transactions are preserved on computer tapes, along with the members' names and addresses (A185). In addition, as the District Court found, damages here can be calculated by one formula applicable to every transaction (A211-12 and A201). The Court of Appeals did not disturb this finding. Accordingly more than half the damages sustained may be paid out routinely, simply by applying a formula to the tape records, as in the case of the payment of corporate dividends to millions of shareholders.

Trial on the underlying common issues—the conspiracy to fix excessive odd lot rates and the New York Stock Exchange's failure to regulate such rates—would be no different whether there were a single plaintiff, a class of a thousand, or of millions. The trial between the representative plaintiff and the defendants will dispose not only of the underlying questions of liability but also of the measure

of damages. *Dickinson v. Burnham*, 197 F. 2d 973, 981 (2d Cir.), *cert. denied*, 344 U. S. 875 (1952); *Union Carbide and Carbon Corporation v. Nisley*, 300 F. 2d 561, 589 (10th Cir.), *cert. denied sub nomine Wade v. Union Carbide and Carbon Corporation*, 371 U. S. 801 (1962). See, *Epstein v. Weiss*, 50 F. R. D. 387, 393 (E. D. La. 1970); *Feder v. Harrington*, 52 F. R. D. 178, 183 (S. D. N. Y. 1970); *In Re Antibiotic Antitrust Actions, supra; Partain v. First National Bank of Montgomery*, 59 F. R. D. 56, 59 (M. D. Ala. 1973).

No undue difficulty is likely to be encountered in making distribution to those class members whose identities and transactions are recorded on tape, and whose damages can be individually computed by a common formula.

Distribution of damages which can be computed by a formula common to the class as a whole is routine in class actions. For example, in *Gould v. American-Hawiian Steamship Company*, 362 F. Supp. 771 (D. Del. 1973), a class action tried on behalf of a class consisting of several thousand minority shareholders, the court found that the defendants were liable for proxy violations. The court ordered that: "Judgment shall be entered against said defendants *in favor of the plaintiff class*" in an amount to be paid in accordance with a common formula.[11]

In a similar situation, the Second Circuit affirmed, as modified, an award in favor of a shareholder class in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973). In both *Gould* and *Gerstle* the awards were made in favor of the class as a whole, leaving for future determina-

11. The formula used in *Gould* was as follows: "$8.25 (the amount of the premium per share determined to have been received by Litton and Monroe) multiplied by the number of shares in the class, and by the 1,050,000 shares owned by Litton and Monroe, and divided by 10,632,000 (the number of shares of McLean common stock issued and outstanding prior to the merger)." *Gould v. American-Hawaiian Steamship Co.*, D. Del., C. A. No. 3707/3722, (Order dated October 23, 1973).

tion what should be done with any part of the recovery which, for one reason or another, cannot be distributed. See also, *Partain v. First National Bank of Montgomery, supra,* 59 F. R. D. at 59.

Both defendants and the Court of Appeals make much of a purported concession of plaintiff's counsel that the case is unmanageable absent the fluid class recovery. There was no such broad concession. Plaintiff's counsel had expressed his concern in the District Court that if each of six million class members *"had to present his own personal claim for damages,* the class, indeed, would not be manageable." (A196). He recognized "that it would be impossible for *each member of the class to expend hours or days combing his ancient files* in order to recover—at best—ten or twenty dollars." (A198). In that light, he proposed that "a reduction in the odd-lot differential in the future would do substantial justice." (A197). Counsel did not concede that the action was unmanageable within the meaning of Rule 23,[12] through use of direct payments based on defendants records. Clearly the "combing of ancient files" would be unnecessary with respect to the more than 2,000,000 class members whose identities and transactions are recorded on tape, and whose damages can be computed by the common formula.[13]

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12. Defendants place so much emphasis on this "concession" as to raise the question whether any substance beyond the "concession" supports their assertions of unmanageability.

13. The Amicus Brief of Southern California Edison Company urging affirmance of the decision of the Court of Appeals, recognizes that in *Eisen* (in alleged contrast to environmental cases of special concern to that Amicus) ". . . damages are mathematically computable, assuming liability." (Amicus Br., p. 6). In *City of Philadelphia v. American Oil Company,* 53 F. R. D. 45, 65 (D. N. J. 1971), cited by the defendants (Resp. Br., p. 42) the Court distinguished *Eisen* on the ground that, "The court in *Eisen* was able to make specific findings with respect to the average odd-lot transaction and average odd-lot differential per transaction. . . . In addition, the court in

The District Court did *not* hold that the class action was unmanageable unless recourse were had to fluid class recovery. The court expressly held that individual recovery would not be ruled out: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder." (A217).

The primary concern of the District Court was "whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim." (A211).

The record sustains, and the decision of the District Court does not preclude the direct-payment form of relief, commonly used in class actions and analogous situations, with respect to more than half of the odd-lot transactions during the period in suit.[14] With respect to the remainder, notice will elicit further claims, and the question of what to do with any residue is entirely premature.

The prospects of achieving a substantial recovery on behalf of the individual class members are thus real enough to overcome the concern expressed by the Court of Appeals that individual class members would not benefit from any recovery. The District Court clearly planned that the class members would benefit, though it quite properly did not choose a particular distribution program, prior to trial on liability and damages.

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13. (Cont'd.)
Eisen had at its disposal several detailed and specific documents which would be of value in assisting the court in awarding damages if liability were found." (e.g. the Special Study).

14. Refunds were made to more than 1,000,000 ultimate consumers "with reasonable promptness and without serious controversy or criticism" under the supervision of a special master in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 179 F. 2d 896, 899 (8th Cir. 1950). The administrative costs were taxed against the defendants, and eventually paid in part by the defendants and in part from the residue portion of the fund.

III.

ENTRY OF JUDGMENT FOR THE AGGREGATE DAMAGES OF THE CLASS AS A WHOLE AND DISPOSITION OF ANY UNCLAIMED RESIDUE UNDER THE EQUITY POWERS OF THE COURT WOULD NOT IMPAIR SUBSTANTIVE RIGHTS OF THE DEFENDANTS.

Rule 23 requires that the judgment in any class action run to the entire class.

Rule 23(c)(3) requires that the judgment describe those whom the court finds to be members of the class and hence bound by the judgment. In Rule 23(b)(1) or (2) actions, the judgment is required to "*include and describe* those whom the court finds to be members of the class." In Rule 23(b)(3) actions, the judgment is required to "*include and* specify or *describe* those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the Court finds to be members of the class." (Emphasis added). Where the common questions determined in a (b)(3) action include a uniform measure of damages applicable across the board to every transaction, and the number of transactions is known, an aggregate class judgment is appropriate, as recognized, for example, in *Gould v. American-Hawaiian Steamship Company, supra; Gerstle v. Gamble-Skogmo, supra; Daar v. Yellow Cab Co.*, 67 Cal. 695, 433 P. 2d 732 (1967); and *Metro Homes, Inc. v. City of Warren*, 19 Mich. App. 664 (1969), leave to appeal denied, 383 Mich. 761 *cert. denied*, 398 U. S. 959 (1970).

In such circumstances, the entry of a single class judgment is consistent with this Court's recent analysis of the 1966 revision of Rule 23 in *American Pipe and Construction Co. v. Utah*, — U. S. —, 42 U. S. L. W. 4155

(January 16, 1974). The Court held the Rule, by precluding one-way interventions in what were previously labelled as "spurious" class actions, converted them from mass joinder devices, as which they had sometimes been regarded, into true class actions in which the class members are bound by the judgment whether favorable or adverse.[15]

In the early history of the class action device at equity, the representative plaintiff was regarded as the true surrogate of the members of the class, as Professor Chafee has shown. Judgment was traditionally entered in favor of the representative for the benefit of the class as a whole, and what was done with the fund then became his concern as trustee for the class, under the supervision of the Court, not the concern of the defendants, who had been adjudged liable for the full recovery. Chafee recounts how "representative suits involving money claims were adjudicated in equity as a matter of course from early times . . . Class suits originated in Chancery, . . . and courts were long inclined to keep them there. This was not just historical nostalgia. A jury might well be bewildered by this queer multipartite proceeding. . . . And the old-time machinery of the law courts was not well adapted to handling a class money judgment. . . . If the representatives . . . successfully collected the judgment, how could a law court compel

15. The Court's reasoning in *American Pipe and Construction Co.* disposes of the defendants' argument that the prior decisions in *Snyder v. Harris*, 394 U. S. 332 (1969) and *Zahn v. International Paper Company*, — U. S. —, 42 U. S. L. W. 4087 (December 17, 1973) preclude entry of judgment in favor of the class as a whole. Those decisions rejected attempts to expand federal diversity jurisdiction. They emphasized the continuing importance of the class action where federal statutes confer jurisdiction without regard to the amount in controversy. As noted in *Zahn*: "Of course, Congress has exempted major areas of federal question jurisdiction from any jurisdictional amount requirements, . . . the exemption being so widely applicable, in fact, that the Court in *Snyder v. Harris*, 394 U. S., at 341, discounted the impact of its holding in federal [question] cases." *Zahn v. International Paper Company*, *supra*, n. 11.

them to distribute the money among the members of the class? No doubt, they held the money under some sort of trust, but the job of compelling every trustee to do his duty belongs to equity." Chafee, SOME PROBLEMS OF EQUITY (1950), Ch. VII, pp. 285-86.

In other words, distribution of the fund is the concern of the court, not of the defendants. *Cf. Hodgson v. Wheaton Glass Co.*, 446 F. 2d 527, 535 (3d Cir. 1971).

This Court employed the same analysis in *Dickinson v. Petroleum Conversion Corporation*, 338 U. S. 507 (1950) holding:

> "The court's reservation of jurisdiction to supervise the distribution of the shares of stock and the provision for further proceedings to determine the individual shares in the aggregate recovery allowed did not in any manner affect [defendant] Petroleum's rights. What the court reserved was essentially supervisory jurisdiction over the distribution among the class of the recovery awarded the intervenors as the class' representatives." 338 U. S. at 515.

Quite apart from the judgment favoring the entire class, the court's general equity powers also extend to requiring the defendants to pay over the aggregate amount of the overcharge. Such equity powers may be exercised without express provision as an adjunct of a statutory scheme. *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), a decision which the defendants mention in passing, but make no real effort to distinguish (Resp. Br., p. 45). See also, *University of Southern California v. Cost of Living Council*, 472 F. 2d 1065, 1070 (Temp. Emerg. Ct. App. 1972).

Entry of judgment for the aggregate damages of the class as a whole does not deprive the defendants of any

substantive rights. As the Amicus Brief of the States of Alabama, Alaska, et al., points out, entry of judgment in favor of a class as a whole is not precluded by any substantive language of § 4 of the Clayton Act. ". . . [A] 'person . . . injured in his business or property' is no less a person because his name is unknown, and the damages are no less 'actual' because they have been proved by a representative rather than a collection of individuals." (Alabama Br., p. 23).[16] The disposition of any residue by means of fluid recovery would "not modify substantive rights," and is supported by sound precedent. *Note, Managing The Large Class Action: Eisen v. Carlisle and Jacquelin,* 87 Harv. L. Rev. 426, 446-451 (1973).

Disposition of an unclaimed residue falls within the equity powers of the court. *Federal Power Commission v. Interstate Natural Gas Company,* 336 U. S. 577 (1949); *Market Street Railway Co. v. Railway Commission,* 171 P. 2d 875 (1966); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, supra.* Reduction of the odd-lot charge provides one equitable solution. Recourse to the *cy pres* doctrine would provide another. That was the solution approved by the Second Circuit in *State of West Virginia v. Chas. Pfizer & Co., Inc.,* 440 F. 2d 1079 (2d Cir.), *cert. denied sub nomine, Cotler Drugs, Inc. v. Chas. Pfizer & Co.,* 404 U. S. 871 (1971), where the unclaimed residue was used by

16. The framers of the Rule rejected a requirement that class members "opt-in" to a class action, adopting instead the view that the anonymity of class members who do not opt-out does not affect the viability of their claims. Kaplan, *Continuing Works of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure,* 81 Harv. L. Rev. 356, 398. "In the circumstances, delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise, the (b)(3) type would become a class action which was not that at all—a prime point of discontent with the spurious action from which the Advisory Committee started its review of Rule 23." See also Rule 23(c)(2)(B) (Pet. Br., p. 4).

the states for public purposes.[17] See also, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).[18]

Defendants' argument that the "fluid class recovery" is contrary to the requirements for recovery under Section 6 of the Exchange Act is without merit. They do not dispute the holding of cases such as *J. I. Case v. Borak*, 377 U. S. 426 (1964), and *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971) that "federal courts may use any available remedy to make good the wrong done". *Cf. SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90-94 (S. D. N. Y. 1970), *aff'd in part, rev'd in part*, 446 F. 2d 1301 (2d Cir.), *cert. denied*, 404 U. S. 1004 (1971). Defendants cite *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.), *cert. denied*, 323 U. S. 737 (1944), as limiting recovery under Section 6 of the Exchange Act to those injured. *Baird v. Franklin* held on the facts that the breach of duty committed by the Exchange was not the proximate cause of injury to the plaintiffs, but indicated that an action would otherwise lie.

Furthermore, *Eisen* involves a claim for equitable relief. The *Eisen* complaint requests specific equitable relief, including judgment "[d]irecting defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the

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17. The defendants do not so much as mention the Second Circuit's decision in *Pfizer*. They argue that the District Court's decision is inapplicable since it arose in a settlement context. The power of the District Court to deal with the residue was at issue on the appeal (albeit between different plaintiff classes). The rights of non-claiming class members, purportedly asserted by defendants, are no different whether the fund has resulted from settlement or litigation.

18. Escheat is another possibility. *See*, 28 U. S. C. § 2042; *United States v. Klein*, 106 F. 2d 213 (3d Cir.), *cert. denied*, 308 U. S. 618 (1939); *Hodgson v. Wheaton, Glass Co., supra*, 446 F. 2d at 535.

amount by which the differential has been excessive in the past."[19] It also requests ". . . such other and further relief as may be just." (A26). Under Section 27 of the Exchange Act, 15 U. S. C. § 78aa, the District Court has equity jurisdiction to award damages or such other retrospective relief as the merits of the controversy may require. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), *Crane Co. v. American Standard, Inc.*, — F. 2d —, CCH Fed. Sec. L. Rep. ¶ 94,327, pp. 95,122-23 (2d Cir., December 19, 1973).

Defendants' argument that use of the fluid class device would intrude upon the exclusive jurisdiction of the SEC is likewise unsound (Resp. Br., pp. 48-52). There is no exclusive jurisdiction conferring immunity against the violations of the antitrust laws and the securities laws herein. *Silver v. New York Stock Exchange, supra. Cf. J. I. Case v. Borak, supra.* See also, pp. 4-5, *supra.* As the Court of Appeals noted in *Eisen II*, no adequate administrative remedy exists for Eisen and the plaintiff class (A127), so that the model of initial agency action with subsequent judicial review is inapposite.[20]

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19. This request for relief has not been rendered moot by subsequent reductions in the odd-lot differential, or merger of the odd-lot dealer defendants, as defendants contend (Resp. Br., p. 44). There is no showing that such changes have eliminated all taint of the defendants' violations.

20. While the Exchange has twice changed the odd lot differential, since the period for which damages are sought, neither regulation was promulgated by an SEC order, under Section 19 of the Exchange Act, 15 U. S. C. § 78s (Resp. Br., pp. 48-49). Defendants are clearly wrong, therefore, in suggesting that such an order is involved, subject to review only by a Court of Appeals under Section 25(a) of the Act, 15 U. S. C. § 78y (Resp. Br., p. 49). Changes effected by the Exchange itself are subject to review in the district courts. *Independent Broker-Dealers' Trade Association v. SEC*, 442 F. 2d 132 (D. C. Cir.), *cert. denied*, 404 U. S. 828 (1971). *Cf. PBW Stock Exchange v. SEC*, 485 F. 2d 718 (3d Cir. 1973). Furthermore, the plaintiff and the members of the plaintiff class are outside the ambit of Section 25(a), which circumvents district court

Fluid recovery entails paying current odd lot traders an aggregate amount equal to any damage residue, by means of a set-off against current commissions. It is simply a way of liquidating a judgment, and encroaches upon the jurisdiction of the SEC no more than any money judgment for customers encroaches upon the jurisdiction of the regulating agency. *See, Federal Power Commission v. Interstate Natural Gas Company, supra,* 336 U. S. at 582-83.

Any interest of the SEC can be accommodated by inviting its participation in the proceedings, a procedure adopted by the district court pursuant to the suggestion of the court of appeals in *Thill Securities Corp. v. New York Stock Exchange, supra,* 433 F. 2d at 273.[21]

IV.

THE RIGHT TO JURY TRIAL DOES NOT POSE DIFFICULTIES OF MANAGEMENT.

The Amicus Brief of the American College of Trial Lawyers ("ACTL Br.") raises the spectre of 100,000 individual jury trials, assuming that only 100,000 claimants come forward, so that "the claims could not be determined in a manner consistent with the Constitution in much less than 100 years." (ACTL Br., p. 5). In a case like *Eisen,* where damages can be calculated on a formula basis, that kind of *in terrorem* argument makes nonsense of class

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20. (Cont'd.)
review for *parties* to SEC proceedings. Since the odd lot differential was not the subject of Commission proceedings, the plaintiff and class members can not even be argued to have been parties thereto.

21. Objections to the fluid recovery theory, including that based upon SEC jurisdiction, are entirely premature, since there is no assurance at this time that the District Court will adopt that technique, rather than another, for the equitable disposition of any residue of the class judgment.

actions, which these *Amici* seek to reconvert into mass joinders. The argument ignores the fundamental principle that: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical." *Hansberry v. Lee,* 311 U. S. 32, 41 (1940). There is to be one decree, not a multitude. Rule 23(c)(3). Only one trial—between the class representative and the defendants—is necessary to determine the common issue of total damage to the members of the class. *Dickinson v. Burnham, supra,* 197 F. 2d at 980-81 (2d Cir. 1952); *Union Carbide and Carbon Corporation v. Nisley, supra,* 300 F. 2d at 589. *See also, Feder v. Harrington, supra,* 52 F. R. D. at 183; *Partain v. First National Bank of Montgomery, supra,* 59 F. R. D. at 59; and *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at 289 ("In these circumstances the Court cannot conclude that defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages."). See, *Dickinson v. Petroleum Conversion Corporation, supra,* 338 U. S. at 515 (quoted at p. 14, *supra*). Defendants will have a full and fair opportunity to litigate all damage issues in the one trial.

Rule 23(d) as promulgated by the Court, provides that, "In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or *prescribing measures to prevent undue repetition* or complication *in the presentation of evidence or argument;* . . ." (Pet. Br., p. 4, emphasis added). The Advisory Committee Note to Rule 23 recommends that, "The court should consider . . . what measure should be taken to simplify the proof and argument." 39 F. R. D. at 106 (Resp. Br., p. 26 sa).

". . . [T]he proof of damages which the district court foresaw would have been based upon the defendants' records plus various studies of the odd lot industry. These should be every bit as reliable in establishing damages as the records and affidavits of individual odd lot customers. Furthermore, as the district court pointed out, an exact computation of damages is unnecessary under the Clayton Act. The Supreme Court has articulated the standard as follows: 'The jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data.' [*Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946); see *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-124 (1969)]."[22] If the defendants are held liable for all of the damages they have caused, that is scarcely an infringement of their substantive rights.

Defendants' jury trial argument also fails to consider the equitable origin of class actions described by Professor Chafee, who suggests that the court should consider class suits for damages "equitable by nature on the analogy of bills for an accounting, where the issues are so complex that a jury trial furnishes an inadequate remedy." (Chafee, *op. cit., supra,* at p. 286). The equitable accounting advocated by Chafee is especially appropriate in dealing with the 56 percent of the transactions of the class which are recorded on computer tapes in the defendants' possession.[23]

In many price fixing and securities actions global damages can: ". . . be accurately computed by reliance on sales figures. . . . Most important management decisions in the business world in which these defendants operate are made

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22. Note, *supra,* 87 HARV. L. REV. at 449.

23. The American College of Trial Lawyers' assertion that ". . . the requisite proof is not available in the books and records of the respondents", (ACTL Br., p. 4) overlooks these tapes.

through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability." *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at 289.

V.

THE NOTICE PRESCRIBED BY THE DISTRICT COURT MEETS THE STANDARDS OF DUE PROCESS AND RULE 23.

The defendants submit that the Court of Appeals correctly held that individual notice is not necessarily required by due process in Rule 23(b)(1) and (2) actions (Resp. Br., p. 59 n. 19). They declare: "The Court of Appeals' decisions (Eisen II and Eisen III) leave ample room for effective civil rights and environmental suits. Such suits are traditionally brought for injunctive relief and, under the decisions below, would not be subject to the notice requirements specified in Eisen; . . ." (Resp. Br., p. 100).[24]

That necessarily confirms the plaintiff's position that individual notice is not a requirement of due process.

Indeed, the defendants submit that: "What is important is that the judgment naturally benefits all persons similarly situated." (Resp. Br., p. 100). The notice prescribed by the District Court in this case is, therefore, by the defendants' own admission, more than sufficient to

24. Of course, many civil rights class actions, such as those concerning employment discrimination, and some environmental class actions, such as the oil spill cases, are brought for damages as well.

sustain the action for equitable relief.[25] It is just as clear that a damage judgment herein, if the class action is sustained and Eisen wins his case, will "naturally benefit" the more than 2,000,000 identifiable class members who can be reimbursed by formula from the defendants' transaction records, and will benefit additional individual class members to the extent that they respond to notice.

Analysis of the interests of the class intended to be protected by notice, as described by the defendants themselves, supports the program of notice prescribed by the District Court. Those interests include the "individual's right to withdraw from the case, bring his own claim, or seek to play a role in management of the action . . ." (Resp. Br., p. 55).

The opportunity to participate is no less significant and, indeed, frequently more so in Rule 23(b)(1) and (2) actions, where defendants concede that individual notice is not required (Resp. Br., p. 59 n. 19 and p. 100). In *Eisen*, where the individual stake is very small, that factor has correspondingly little significance, as does the possibility of individual suit. Indeed, the defendants themselves assert that there is no risk of inconsistent results, because it would be too expensive for individuals to pursue their claims separately (Resp. Br., p. 60). The Court of Appeals was satisfied in 1968 that: ". . . the present case appears to fall within that class of cases in which 'the interests of individuals in conducting separate lawsuits' are more 'theoretic than practical' . . ." (A126).

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25. This should, in turn, sustain the notice in its (b)(3) aspect. "It will be found that cases satisfying (b)(1) or (b)(2) will also pass muster under (b)(3). As was perceived in *Van Gemmert v. Boeing*, 259 F. Supp. 125 (S. D. N. Y. 1966), the cases should then ordinarily be treated under the former provisions rather than the latter." Kaplan, *op. cit. supra*, 81 HARV. L. REV. at 390 n. 130.

What remains? Defendants suggest that class members are entitled to individual notice because some "may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious" (Resp. Br., p. 59). It has been held that members of a class (other than the plaintiff and any intervenors), who do not request exclusion ". . . are not parties and would not be liable for costs . . ." *Lamb v. United Security Life Company*, 59 F. R. D. 44, 48 (S. D. Iowa, 1973).[26] And that, "If class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule 23." *Id.* For the same reason interrogatories to the individual class members have been held inappropriate. *Fischer v. Wolfinbarger*, 55 F. R. D. 129 (W. D. Ky., 1971); *Wainwright v. Kraftco Corp.*, 54 F. R. D. 532 (N. D. Ga., 1972); *Gardner v. Awards Marketing Corp.*, 55 F. R. D. 460 (D. Utah, 1972). In the circumstances of this case the real concerns of due process and Rule 23(c)(2) are well served by the initial notice prescribed by the District Court.

As the Court of Appeals reads the language of Rule 23(c)(2),[27] the phrase "practicable under the circumstances" does not extend to "individual notice". The result "is unnecessarily harsh. Given the rule's requirement that only a 'reasonable effort' need be made to identify class members it is pointless to require a disproportionate effort to notify those who are thus identified. A better reading would make the efforts required by these phrases comparable. Furthermore, the evidence that the rule was designed to satisfy due process without imposing an addi-

26. *Cf.*, Chafee, Some Problems of Equity, Ch. VI, p. 219.

27. "[I]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . ."

tional requirement suggests that practicability must always be a consideration in evaluating notice, since it is central to the due process test." Note, *supra*, 87 HARV. L. REV. at 440.[28]

Professor Kaplan, as reporter to the Advisory Committee, was also firmly of the view that practicability was intended as the test for individual, as well as other, (c)(2) notice. Kaplan, *op. cit.*, 81 HARV. L. REV., *supra*, at 396.

VI.

REQUIRING DEFENDANTS TO SHARE THE COST OF NOTICE DOES NOT VIOLATE THEIR FIFTH OR SEVENTH AMENDMENT RIGHTS.

The Court of Appeals recognized that in some cases defendants can properly be required to advance the cost of notice, distinguishing *Eisen* because it was not a derivative suit in which defendants owed a special duty to plaintiffs, or a suit against a public utility by its customers in which the utility customarily sent monthly bills to plaintiffs (A352 n. 5).

The defendants support the holding that in some class actions it may be appropriate to require the defendants to pay for notice, arguing that: "Many of the briefs amici overlook this careful limitation in the Court of Appeals decision." (Resp. Br., p. 63). The New York Stock Exchange and its members, the odd-lot dealers, owe no lesser

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28. *Accord*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 605 (1974); ". . . [I]f the representation of an absent class member's interests is found to have been adequate, the absentee, in effect, will have had his day in court and notice should not be required as an additional due process requirement. Support for this approach may be found in the *Restatement of Judgments* [§ 86, comments (b) and (h) (1942)], in *Hansberry* [*v. Lee*, 311 U. S. 32 (1940)], and in other decisions which have asserted . . . that adequacy of representation rather than notice is the essential prerequisite of due process."

duty to the investing public than a public utility owes to its customers. There is certainly no distinction rising to constitutional significance between *Eisen* and cases in which defendants concede that the cost of notice may properly be allocated to defendants. In *Eisen* the plaintiff remains liable for costs, should the defendants ultimately prevail and, in that event, defendants would have a judgment for costs against him.[29]

The cost of notice in a class action should properly be regarded as an ordinary expense of litigation, and within the power of the District Court to allocate. The defendants attempt to distinguish the cases relating to the cost of discovery (Pet. Br., n. 8 and p. 41) on the ground that: "Those costs are traditional and consistent with the adversarial process of litigation—totally different from being required to finance a lawsuit against one's self." (Resp. Br., p. 68).

Defendants are not being required to finance a lawsuit against themselves (Resp. Br., p. 68).[30] The phrase implies, incorrectly, that they are being compelled to pay a cost required of the individual plaintiff and benefitting only the plaintiff and the members of the class.

Rule 23(c)(2) requires that the "court shall direct" notice to the class; it does not state against whom the cost should be taxed. Division of the cost of notice has become as traditional as discovery costs in the district courts, since the 1966 amendment to Rule 23 (Pet. Br., pp. 38-39), and here an adversary hearing has determined that plaintiff and the class are likely to prevail on the merits.

Defendants benefit, as do the members of the plaintiff class, where, as here, notice in conformity with Rule 23 and

29. The plaintiff did not claim that he could not pay any more than token costs (Resp. Br., p. 66), but rather that whatever he had to put up would be an undue burden on him (A273).

30. The argument against "financing a lawsuit against one's self" could be made more appropriately with regard to costs of discovery, which may benefit only the adverse party.

the requirements of due process has been ordered by the District Court.[31] If the defendants prevail on the merits, the entire class is bound by the adverse judgment. *Cf. American Pipe & Construction v. Utah, supra.* The benefit to defendants is not theoretical. They complain at some length about the alleged inadequacy of the scope of notice ordered by the district court, on the ground that defects in notice may deprive them of the *res judicata* effect of the judgment (Resp. Br., p. 61).

Because all parties benefit from notice, and because the cost of notice is a cost of litigation required by Rule 23, it is no denial of due process to require the necessary cost to be advanced by the party shown most likely to be ultimately liable for it.[32]

The hearing on allocation of the cost of notice did not infringe defendants' right to a jury trial. Costs "are never within the province of the jury." *Harkless v. Sweeny Independent School District,* 278 F. Supp. 632, 637 (S. D. Tex. 1968), *rev'd on other grounds,* 427 F. 2d 319 (5th Cir. 1970), *cert. denied,* 400 U. S. 991 (1971). In any event, the defendants did not request a jury trial on this issue in the District Court.

VII.

THE DISTRICT COURT'S ORDERS SUSTAINING THE CLASS ACTION WERE NOT APPEALABLE.

A. There Was No Appealability as of Right.

Defendants lump together as a single "final" decision "appealable of right under 28 U. S. C. § 1291" two sepa-

31. See the Brief of Amicus the Commonwealth of Pennsylvania, pp. 5-7.

32. Defendants do not contest the requirement that they ultimately pay for notice, if the plaintiff prevails at trial. At issue is their contention that the cost may not be assigned to them in the interim, though the District Court has found a great likelihood that ultimately they will be found liable (A289-90).

rate orders of the District Court, entered one year apart (Resp. Br., p. 82). The 1971 order (A199) sustained the plaintiff's right to maintain the action as a class action. It is separate and distinct from the 1972 order requiring the defendants to advance part of the cost of notice (A275). Respondents' appealability arguments based upon the cost of notice (Resp. Br., pp. 84-85) are not pertinent to the 1971 order of the District Court sustaining the class action. That order is subject to modification in the District Court and is not appealable under the overwhelming weight of authority, as cited in Petitioner's Brief at pp. 21-22. *Accord, Thill Securities Corp. v. New York Stock Exchange,* 469 F. 2d 14, 17 (7th Cir. 1972).

The April 4, 1972 order, which imposed 90 percent of the cost of notice on the defendants was not a final order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The Court of Appeals itself recognized that in some cases imposition of the cost of notice on defendants is proper (A352 n. 5). Defendants agree, arguing that the Court of Appeals limited its holding to "this type of case" (Resp. Br., pp. 19, 63). As a general principle, therefore, the right of the district court in class actions initially to allocate the cost of notice to defendants in appropriate circumstances is uncontested; it is only the particular application in this case that the defendants challenge. *Cohen* does not hold such an issue appealable. With regard to such issues, this Court said: "If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." 337 U. S. at 547. The decision of the Court of Appeals in *Eisen* fosters the kind of case by

case piecemeal review which is generally forbidden, and to which the *Cohen* exception does not apply.[33]

Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A., 339 U. S. 684 (1950), relied on by defendants, held that an order dissolving the attachment of a ship was immediately appealable, but contrasted an order allowing an attachment to stand, which is not. The latter is the correct analogy, for the plaintiff will be liable for the costs, should defendants prevail at trial.

Interlocutory orders requiring far greater expenditure than that involved here have repeatedly been held inappropriate for review in view of the policy of finality. See Petitioner's Brief at pp. 24-25, fn. 8. *Cf. IBM Corp. v. United States,* 1973-2 CCH Trade Cases ¶ 74,833 (2d Cir. 1973), in which the Second Circuit held that an order of the District Court imposing a fine of $150,000 a day for civil contempt in refusing to comply with a discovery order, was interlocutory and not appealable.

In *Republic Natural Gas Company v. State of Oklahoma,* 334 U. S. 62, 70-71 (1948), the Court held that, "... [T]he incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention. ... Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review. ... The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction."

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33. The defendants cite the decision in *Pfizer, Inc. v. Lord,* 449 F. 2d 119 (2d Cir. 1971) to demonstrate the "sizeable judicial resources" consumed in that case (Resp. Br., p. 98). The appellate court's observation, in its context, is in point:

> "This litigation has already consumed sizeable judicial resources and can be expected to do so. It is not particularly helpful to have the defendants seek interlocutory review of each decision of the district court with which they disagree."

B. The Court of Appeals Had No Retained Jurisdiction.

Defendants adhere to the position that the District Court's 1966 order initially denying class status (A93) was interlocutory and not appealable (Resp. Br., p. 92). If they are correct, the Court of Appeals had no jurisdiction to "retain". In any event, the correctness of the initial "death knell" appeal need not be reached. An appellate court cannot reverse the District Court and by contradiction purport to retain plenary jurisdiction years later. See Petitioner's Br., pp. 20-21.

The cases cited by the defendants are inapplicable, because in each of those cases the appellate court explicitly withheld judgment while remanding only for further findings. *Cf. United States v. Johnson,* 73 U. S. [6 Wall.] 792 (1868). Here the Court of Appeals explicitly rendered judgment of reversal (A133 and A138).

VIII.

THE DISTRICT COURT'S ORDERS DID NOT VIOLATE THE ENABLING ACT OR PRINCIPLES OF FAIRNESS.

The defendants suggest that the class action orders of the District Court would so alter their substantive rights as to violate the terms of the Rules Enabling Act, 28 U. S. C. § 2072 (Resp. Br., pp. 24-25). This Court has held, to the contrary, that a procedural rule that subjects defendants to the jurisdiction of the courts is not thereby other than procedural. In *Mississippi Publishing Corporation v. Murphree,* 326 U. S. 438, 445-446 (1946), the Court observed that:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not ad-

dressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 11-14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the District Court for Northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced."

In *Sibbach v. Wilson & Co.*, 312 U. S. 1, 14 (1941) the Court held that: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Accord: Hanna v. Plumer*, 380 U. S. 460 (1965). See also, pp. 14-15 *supra*.

In addition, the defendants rely upon an alleged *in terrorem* effect of Rule 23(b)(3), which they claim amounts to "blackmail" (Resp. Br., pp. 102-104). It is true that the prospect of liability may induce settlement, be it liability in an individual action or in a class action.[34]

34. But there is no reason to suppose that such pressures are unfair. If defendants have overcharged vast numbers of people of an enormous aggregate sum, it is entirely appropriate that a suit to recoup that sum *in toto* should create great pressure. As Professor Dole has pointed out class suits based on meritorious claims are quite different from "strike suits" based on frivolous claims. Rule 23(e) provides safeguards against the latter. See Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974 (1971). *Cf. Papilsky v. Berndt*, 466 F. 2d 251, 254 (2d Cir. 1972). It is the result urged by the defendants that is inappropriate, namely that guilty defendants should be allowed to keep their illegally gotten gains.

In *Telex Corporation v. International Business Machines Corp.*, 1973 CCH Trade Cases ¶ 74,774 (N. D. Okla., 1973), the district court entered judgment in favor of the sole plaintiff for $259.5 million. The actual liability in that action between individuals was more than twice the maximum estimated liability in the action at bar, which is conceded by all to be a large class action. Any *in terrorem* effect was presumably far greater there than here.

Defendants' claim simply is not true, that in consequence of the *in terrorem* effect or otherwise, all class actions are settled (Resp. Br., p. 105).[35] Many class actions have proceeded to trial. *E.g., Gould v. American-Hawaiian Steamship Company, supra; Gerstle v. Gamble-Skogmo, supra; Escott v. BarChris,* 283 F. Supp. 643 (S. D. N. Y. 1968); *Feit v. Leasco Data Processing,* 332 F. Supp. 544 (E. D. N. Y. 1971); *Kohn v. American Metal Climax,* 322 F. Supp. 1331 (E. D. Pa., 1971), *aff'd in part rev'd in part* 458 F. 2d 255 (3d Cir. 1972), *cert. denied* 409 U. S. 874 (1973); *Robinson v. Lorillard Corporation,* 319 F. Supp. 835 (M. D. N. C. 1970), *aff'd in part rev'd in part* 444 F. 2d 791 (4th Cir.), *cert. denied* 404 U. S. 1006 (1971); *Siegel v. Chicken Delight,* 311 F. Supp. 847 (N. D. Cal. 1970), *aff'd*

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35. The defendants do not disclose the role of William Simon, whom they cite to this Court as a "commentator" on class actions supporting their *in terrorem* theory (Resp. Br., p. 103). They quote his "comments" on the very case in which he was counsel of record to defendant Humble Oil & Refining Co., without disclosing his interest. *(City of Philadelphia v. American Oil Co., supra.)*

His client, Humble, did not move for summary judgment in the *City of Philadelphia* proceedings. It had in fact, by the time of settlement, pleaded *nolo contendere* to a related federal price-fixing indictment. Nor were the private actions settled as a direct result of certification of the governmental and bulk purchaser classes. They were settled one-and-a-half years later, after the plaintiffs secured and upheld against appeal by, *inter alia,* Humble Oil & Refining, an order permitting inspection of grand jury transcripts. *United States v. American Oil Company,* 456 F. 2d 1043 (3d Cir.), *cert. denied sub nomine American Oil Company v. City of Philadelphia,* 409 U. S. 893 (1972).

in part rev'd in part 448 F. 2d 43 (9th Cir. 1971), *cert. denied* 405 U. S. 955 (1972); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E. D. Mich. 1973). There is no indication that the settling proportion of class actions exceeds the settling proportion of other actions.

Finally, Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment. It affords every bit as much protection against alleged "blackmail" in class actions as it does in other actions.

IX.

THE INTERESTS OF JUSTICE REQUIRE REVERSAL OF THE DECISION OF THE COURT OF APPEALS.

The defendants suggest that Rule 23(b) was intended solely as a procedural device to achieve economies of time and effort, as a "device for consolidating numerous *existing* claims." (Resp. Br., pp. 97 and 26-27). That was only half of the dual purpose of the revised Rule.

Although the defendants' attempt to characterize the pre-1966 cases as pertaining only to the avoidance of multiple suits, the decisions were clearly otherwise. This Court's decision in *Smith v. Swormstedt*, 57 U. S. 288, 302 (1853), expressed concern lest in the absence of class suits no effective adjudication could be had, and held that, "For convenience, therefore, *and to prevent a failure of justice*, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." (emphasis added).

The Seventh Circuit observed in *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 88, 90 (7th Cir. 1941), long before the 1966 revision, that:

> "To permit the defendants to contest liability with each claimant in a single separate suit, would, in many

cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent."

The Advisory Committee Notes do not indicate that consolidation of existing claims was the sole purpose of Rule 23(b)(3), as defendants contend (Resp. Br., pp. 26 and 97). To the contrary, the Note to Rule 23(b)(3) specifically envisions class certification, where as here the "amounts at stake for individuals may be so small that separate suits would be impracticable." 39 F. R. D. at 104 (Resp. Br., p. 21sa).

To bolster their position, defendants cite a remark by Professor Kaplan, Reporter to the Advisory Committee during the 1966 revision, that economy is a goal of Rule 23. One goal does not preclude another, and Professor Kaplan has observed that:

> "The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, *A Prefatory Note*, 10 B. C. IND. & COMM. L. REV. 497 (1969).[36]

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36. See also, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules, supra*, 81 HARV. L. REV. at 398 (for "small claims held by small people" the (b)(3) action intentionally "serves something like the function of an administrative proceeding". . . . The alternative of treating such claims and persons "as null quantities is questionable").

The many disinterested and learned commentaries upon Rule 23 cited in Petitioner's Brief and this Reply Brief have generally applauded the operation of Rule 23 in efficiently securing relief from violations of law affecting numerous individuals; for example, the articles by Professors Hazard, Homburger, Kaplan, and Miller. District Judge Jack Weinstein, formerly a distinguished professor of civil procedure at Columbia University, likewise views class actions as generally manageable and not abusive. Weinstein, "Some Reflections on the 'Abusiveness' of Class Actions" 58 F. R. D. 299 (1973).[37] Judge Weinstein sounds the warning that class actions touch "on the credibility of our judicial system":

> "Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against a corporation, which has benefitted to the extent of many millions of dollars from collusive, illegal pricing of its goods." 58 F. R. D. at 305.

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37. Judge Weinstein is unimpressed by complaints about "what one appellate judge in our circuit has dubbed the elusive Frankenstein Monster posing as a class action," responding, "I suggest that the monster is neither so large or as terrible as some would have us believe. The procedure is merely one means for transforming legal rights into effective remedies," *Id.* The observation is especially compelling, coming as it does from a District Judge who has both disallowed and sustained class actions, and seen them through trial. *E.g., Dolgow v. Anderson,* 43 F. R. D. 472 (E. D. N. Y. 1968) and *Feit v. Leasco,* 332 F. Supp. 544 (E. D. N. Y. 1971).

Judicial efficiency is not achieved by closing the doors of justice; it is achieved by efficient procedure in the pursuit of justice.

Finally, a statement of the Securities Exchange Commission as cited at some length in *Dolgow v. Anderson*, 43 F. R. D. 472, 482-484 (E. D. N. Y. 1968) declares that:

> "The Activities of The Securities and Exchange Commission Do Not Eliminate The Need For Class Action Procedure In Private Actions Based on Violations of the Federal Securities Laws. . . .
>
> "Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fraudulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action seems to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such remedies may be vindicated."

Plaintiff has refrained throughout from citing partisan "authorities". That principle has, unfortunately, not been followed by the defendants who cite Professor Handler, William Simon, and the work of the Committee on Rule 23 and Multidistrict Litigation of the American College of Trial Lawyers.[38] The interests of these concededly eminent members of the bar are not disclosed in either the defendants' brief or the ACTL Amicus Brief. They, and the firms in which they are the senior litigators, have in fact been involved in a number of cases cited disparagingly, and inaccurately, in the ACTL Amicus Brief (p. 21).[39] Mr. Gates

38. Whose members are also the authors of the ACTL Amicus Brief (ACTL Br., p. 22).

39. The description of the *American Oil Company* litigation includes only the recoveries of certain sub-classes. It omits to mention

was counsel for defendant Phelps Dodge in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452 (E. D. Pa. 1968), the brass mill price fixing class action litigation. Mr. McAfee represented defendant Rheem in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E. D. Pa. 1972), *rev'd* 487 F. 2d 161 (3d Cir. 1973), the plumbing fixtures price fixing litigation. His firm Cravath, Swaine & Moore represented defendant California Oil Company in *City of Philadelphia v. American Oil Company*, 53 F. R. D. 45 (D. N. J. 1971), the tri-state gasoline price fixing litigation. Mr. Strubing's firm, Pepper, Hamilton & Scheetz, represented defendant Sun Oil Co. in the *American Oil Company* case and Crane Co., as a defendant in the plumbing fixtures litigation. Mr. Schwartz' firm, Sullivan & Cromwell, represented American Standard in the plumbing fixtures litigation. Mr. Simon represented Humble Oil and Refining Co. in the *American Oil Company* case,[40] and Professor Handler represented defendant Texaco therein. They have also represented defendants in many class action cases not cited in the ACTL Brief.[41]

To state that distinguished counsel are not disinterested is not to belittle them. But the presence or absence of personal interest is necessarily a factor in evaluation, and properly should have been disclosed. *Cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. 127, 140 (1961).

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39. (Cont'd.)
the recoveries by 2,946 entities, in the general governmental sub-class, who shared between them a net refund of more than $18 million.

40. See Note 35, *supra*.

41. For example, Mr. Schwartz represents defendant American Metal Climax, Inc. in a securities class action tried to a successful conclusion by counsel for the petitioner herein as to liability and equitable relief on behalf of the class. *Kohn v. American Metal Climax, Inc.*, *supra*. Following appeal, the case was settled for $6,500,000 in cash, and other benefits.

It may be that the position advocated by these attorneys reflects the interests of their regular clients, on whose behalf they have opposed class actions in the above cases, among others.[42] At least one author of the ACTL Amicus Brief has in fact expressed views at odds with that Brief, when he has stepped outside of his role as advocate. On that occasion, Mr. Strubing, addressing the Pennsylvania Bar Institute as a faculty member of a recent panel on class actions, stated that:

> "As to notice, I predict that the method of notice devised by the District Court [in *Eisen*] will be sustained, although the defendants are attacking it. There are six million claimants of whom two million are readily identifiable from the records of the defendants. The District Court decided that of the two million, two thousand should be chosen by random and given direct notice, actual notice by mail, and that there should be in addition publication in some seven or eight or more newspapers. Going back to as far as *Hansberry and Lee* and even in state courts, the question of the adequacy of notice in class actions has to my mind always been recognized by the courts as depending not on the actuality of notice, but on the validity of the representation obtained for the plaintiffs as a result of that

42. The ACTL Amicus Brief opposes class actions because, *inter alia*, counsel for the classes may receive large fees for their efforts. It fails to disclose that in the four cases for which fees are cited (ACTL Amicus Brief, p. 21) the gross recovery for the classes was more than $87,000,000. This Court has encouraged the award of counsel fees in such public interest cases. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970). Since counsel fee awards in class actions are subject to court approval, there is ample protection against abuse.

In any event, the issue of fees is completely irrelevant to certification of a class. If the plaintiff class prevails at the trial and a fee is subsequently awarded, there will be ample opportunity to litigate its propriety. Raising a fee issue now is not only premature, it is disingenuously inflammatory.

notice. If I make myself clear, I understand the courts to have held, and I expect the Supreme Court to hold, that if as a result of this method of notice in *Eisen* does, as I think it is likely to do, convince the Court that sufficient people received actual notice having the same interests or representing all the interests involved on the plaintiffs' side, and there is adequate representation by those who are actually before the court as plaintiffs, whether original plaintiffs or ones who subsequently joined, then those unnoticed, whether deliberately or by accident (and I should point out that no matter what mailing you make some people are not going to receive actual notice) is sufficient to bind those people, because they have been represented adequately in court and that is the basis for sustaining any class action.

• • •

As to who should pay for the notice, I hesitate to make any prediction. There are cases and there have been hints in a number of opinions by important courts, that there are situations in which the defendant should undertake some of the activity, at least with respect to notice which would cost money. For example, an electric utility which sends bills monthly to its customers. Obviously, it doesn't cost much, if anything, to stuff an extra piece of paper in the monthly bill. On the other hand, whereas here you are going to make a defendant put out, I think it is around $90,000 [sic], to send out the type of notice ordered, I don't see how the Supreme Court can approve that *unless* it says that the order must have been preceded by a mini-hearing at which the judge makes a finding of a reasonable probability of success on the part of the plaintiff. This, of course, is the standard test in a prelim-

inary injunction application, a temporary retraining order, and was the procedure used by the District Court in the *Eisen* case."

Proceedings of the Pennsylvania Bar Institute, Harrisburg, Pa., December 7, 1973: Remarks of Philip H. Strubing, Esq. (Transcribed from recordings of the proceedings, made available by the Institute to plaintiff's counsel).

The defendants are plainly apprehensive that in restricting the usefulness of class actions the Court of Appeals has too apparently jeopardized civil rights and environmental cases; so they hasten to suggest that the decision does not apply to such cases (*e.g.*, Resp. Br., pp. 21, 100). The American College of Trial Lawyers reflects the same view (ACTL Br., p. 12). The distinctions which they seek to make are patently without substance.[43]

Indeed, the zeal of the ACTL has led it into an extraordinary error. "Contrary to the assertions made by several of the *amici* who support petitioner," the ACTL Brief declares, "the decision of the Court of Appeals would not affect in any significant way the efforts of those who seek by litigation to vindicate the civil rights of the underprivileged. After all, this Court's landmark civil rights decisions were *not* rendered in class actions and did not depend in any way upon Rule 23." (Amicus Br., pp. 21-22). This statement is contradicted by the leading case cited to support it, *Brown v. Board of Education*, 347 U. S. 483 (1954) (*Id.*, p. 22), which was undeniably a class action. See 347 U. S. at 495. This, the most significant and far reaching civil rights action of the century, was litigated

43. Professor Philip Schrag of Columbia Law School has observed that in *Eisen* "if the ruling of the lower court is affirmed, it's a disaster for consumer protection and environmental protection groups." Christian Science Monitor, February 6, 1974, p. 1.

as a class action, and was not derailed by unreasonable and unnecessary individual notice requirements, because what counted was the adequacy of representation.[44]

The rights of the class in *Eisen* are important federal rights which merit vindication under the antitrust laws and the Exchange Act, and should not be sacrificed to the cynical view that the remedy is inversely proportional to the number of persons injured. Such a holding scarcely engenders the respect for law which is already held in low enough public esteem. In a variety of situations courts require recourse to the class action device in order to fashion effective relief. See *e.g., Bermudez v. United States Department of Agriculture, supra,* 17 F. R. Serv. 2d at 1156-1157.

The defendants' attempts to mask the devastating impact of the *Eisen* decision are also negated by the great concern shown by those Amici who have openly disclosed where their own interets lie and perceive a severe threat if the *Eisen* decision is permitted to stand—twenty states (whose attorneys general represent the full range of the political spectrum), the American Civil Liberties Union, the Public Citizen and Consumers Union of the United States, and the NAACP Legal Defense Fund.

The fall-out of *Eisen* is already taking its toll, as district courts sense that the law has changed toward limiting class actions once again to mere joinder devices.[45] Thus in *Ralston v. Volkswagenwerk A. G.,* 1973-2 CCH Trade cases ¶ 74,772 (W. D. Mo. 1973), the Court said "*Eisen III* is a substantial and justifiable departure from the views expressed in an opinion filed in an earlier appeal in that case,

44. The school desegregation cases are among many civil rights cases resolved by the Court as class actions. See *e.g., Griggs v. Duke Power Company,* 401 U. S. 424 (1971) and *Turner v. Fouche,* 396 U. S. 346 (1970).

45. But see, *American Pipe & Construction Co. v. Utah, supra.*

and I therefore place little reliance on the substantial body of case law that has developed from the opinion in Eisen II . . . ." That "substantial body of case law" is now threatened, including cases in every Court of Appeals where the issue has been presented, holding that Rule 23 should be liberally construed and wide discretion allowed to the district courts "on the firing line".

The defendants' basic thrust is to scoff at the notion that violators of the anti-trust laws should be made to repay the "fruits of their violations". They describe that notion as an "extraordinary position" (Resp. Br., p. 21), and characterize it as "plaintiff['s] . . . philosophy" (Resp. Br., p. 21). But nowhere in their 109 page brief do the defendants try to distinguish *Hanover Shoe Co. v. United Shoe Machinery,* 392 U. S. 481, 494 (1968), in which the stated purpose of the holding was to insure that violators of the antitrust laws would not "retain the fruits of their illegality because no one was available who would bring suit against them."

The rule of *Hanover Shoe* that wrongdoers ought not be allowed to profit from their wrong is not a rule invented by plaintiff in this case; nor is it "an alleged principle of equity" (Resp. Br., p. 45). Rather it is a principle that has been repeatedly announced by this Court. *Accord: Bigelow v. RKO Pictures,* 327 U. S. 251, 265 (1946), a case also ignored by the defendants.

Rather than deciding questions which may never arise and are clearly not ripe for review, such as fluid recovery, and insisting that the plaintiff must pay for millions of individual notices, which he cannot possibly afford and which due process does not require, the Court of Appeals should have borne in mind that ". . . class suits were known before the adoption of our judicial system, and were in use in English Chancery. . . ." *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, 366 (1921). Instead of strait-

jacketing the District Court, it would better have taken to heart the wisdom of Lord Cottenham in *Taylor v. Salmon*, 4 Myl. & Gr. 134, 141-2 (1838) that:

> "[It is] the duty of this Court to adapt its practice . . . to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not . . . decline to administer justice, and to enforce rights for which there is no other remedy." (Quoted in Chafee, Some Problems of Equity, Ch. VI, p. 212).

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Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF.

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MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

Petitioner respectfully moves the Court for leave to file a Supplemental Brief pursuant to Rule 41, to bring to the Court's attention the intervening decision of the Court of Appeals for the Second Circuit in *Herbst v. International Telephone & Telegraph Corp.*, — F. 2d — (2d Cir. 1974),[1] bearing upon and explicitly clarifying the decision of the Second Circuit at bar. *Herbst* was decided on April 3, 1974, after argument herein.

Respectfully submitted,

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1. A copy of the opinion of the Second Circuit in *Herbst* is printed in an Appendix hereto.

SUPPLEMENTAL BRIEF.

In *Eisen III*, the Court of Appeals for the Second Circuit permitted defendants to appeal as of right the District Court's order confirming the case as a class action. In Petitioner's briefs and arguments before this Court, Petitioner has argued that the Second Circuit's action invites interlocutory appeals in every class action, imposing a great new burden on the courts of appeals, and should therefore be reversed on the ground that the District Court's order was unappealable (Pet. Br., p. 23). Respondents denied that the *Eisen III* decision had any such broad effect, saying that the Second Circuit could not have intended so greatly to expand the number of orders subject to appeal, for "If [the Court] had held each class action determination appealable, it would have revolutionized, by a footnote, the law of the Second Circuit . . ." (Resp. Br., p. 94).

On April 3, 1974, the Second Circuit decided *Herbst v. International Telephone & Telegraph Corp.*, — F. 2d — (2d Cir. 1974), unequivocally supporting Petitioner's construction of *Eisen III*. In *Herbst*, a defendant was once again permitted to appeal a decision allowing a class action, under 28 U. S. C. § 1291 and the "collateral order" doctrine. The Court, in an opinion by Judge Lumbard (a member of the panel in *Eisen*) held that "[a]lthough other courts of appeals have held that orders authorizing class actions are not appealable," *Eisen III* permits the appeal of every such order in the Second Circuit. *Herbst* holds that, since

Eisen, every "order authorizing a class action is appealable under *Cohen*. . . ."

The other panel members in *Herbst* supported Judge Lumbard on the question of appealability, because they believed that the issue had been settled in *Eisen III*. Judge Mulligan, concurring, stated that, "*Although I have grave doubt that this order granting class action status is appealable,* I am not inclined to depart from *Eisen III* which is now on review in the Supreme Court." (emphasis added). Judge Danaher, "concurring (but *dubitante*)", added that, "What amounts to 'grave doubt' in Judge Mulligan's view is for me a persistent perturbation. I had supposed that 28 U. S. C. § 1291 would limit our review jurisdiction to 'final' decisions of the district court." Judge Danaher cited decisions of the Third, Fifth, Sixth, Seventh, and Ninth Circuits contrary to the expansive doctrine of appealability adopted in *Eisen III,* adding that:

> "The *Eisen* case was argued three weeks ago. Perhaps the Court will give consideration to what Judge Friendly has said in *Weight Watchers of Phila. v. Weight Watchers Int.* (2 Cir. 1972), 455 F. 2d 770, 773-774, particularly in light of his suggestion that *Cohen* 'be kept within narrow bounds, lest this exception swallow the salutary final judgment rule'."

It is now clear, if it was not before, that *Eisen III* invites, if not requires,[2] interlocutory appeal by all defendants against whom classes are certified.[3] In light of *Herbst,* it is evident that *Eisen III* (in the language of the Respondent's Brief, p. 94) "revolutionized, by a footnote, the law of

2. See *Herbst,* n. 10.

3. The "death knell" doctrine, by comparison, permits interlocutory appeal by only a small minority of putative class representatives—those who could not proceed absent a class action.

the Second Circuit'' on finality and interlocutory review, requiring reversal by this Court.

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 314—September Term, 1973.

(Argued January 9, 1974 Decided April 3, 1974.)

Docket No. 73-2062

HILDA HERBST,

Plaintiff-Appellee,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.,

Defendants-Appellants.

Before: DANAHER,* LUMBARD and MULLIGAN, *Circuit Judges.*

Appeal from an order entered on May 11, 1973 in the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* which held that plaintiff's action under the securities laws could be maintained as a class action. — F. Supp. —.

Affirmed.

---

* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

JOHN H. SCHAFER, Esq., Washington, D. C. (Charles Lister, Covington & Burling, Washington, D. C.; Joseph P. Cooney, Cooney, Scully and Dowling, Hartford, Connecticut, on the brief), *Attorneys for Appellants International Telephone and Telegraph Corporation, Raymond L. Brittenham, Francis J. Dunleavy, Russell F. Erickson, Harold S. Geneen, R. Newton Laughlin, Hart Perry and Ted B. Westfall.*

SAMUEL E. GATES, ROBERT L. KING, Debevoise, Plimpton, Lyons & Gates, New York, New York; John Q. Tilson, Wiggin & Dana, New Haven, Connecticut, on the brief, *Attorneys for Appellants Eugene R. Black, George R. Brown, Alvin E. Friedman, J. Patrick Lannan, John A. McCone and Warren Lee Pierson.*

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SIDNEY B. SILVERMAN, Esq., New York, New York (Silverman & Harnes, New York, New York; James O'Connor Shea, New Haven, Connecticut, on the brief), *Attorneys for Appellee.*

LUMBARD, *Circuit Judge:*

This appeal from the District of Connecticut by the International Telephone and Telegraph Corporation (ITT)

and its directors in May 1970 [1] brings before us once again important questions concerning the administration of class actions. The first and more difficult issue is whether Chief Judge Blumenfeld's order of May 11, 1973, — F. Supp. —, which held that this case may be maintained as a class action is appealable at this time. The second issue is whether the judge was correct in so holding. We hold that the order is appealable and that the district court correctly decided that a class action is proper.

I.

Alleging that ITT in its controversial [2] acquisition of the Hartford Fire Insurance Company (Hartford) violated several provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 as well as Rules 10b-5 and 15c-2 of the Securities and Exchange Commission,

1. One director, Charles T. Ireland, Jr., died at about the time this action was commenced, and plaintiff has chosen not to serve his estate.

2. The Department of Justice tried unsuccessfully to gain a preliminary injunction against the Hartford Insurance-ITT merger. *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969) (Timbers, *J.*). This case together with the suits against ITT's mergers with the Canteen Corporation and the Grinnel Corporation were eventually settled by consent decree. See *United States v. International Tel. & Tel. Corp.*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom. Nader v. United States*, 410 U. S. 919 (1973).

The complaint in this case appears to be based on a complaint filed on June 18, 1972 in the Southern District of New York by the Securities and Exchange Commission, which charged that ITT in the course of the Hartford merger sold unregistered securities by its arrangement (discussed below) with an Italian bank. Two days later ITT agreed to a permanent injunction. BNA Securities Regulation & Law Reporter, June 21, 1972, at A-6.

Subsequent to the argument in this case, the Internal Revenue Service revoked the revenue ruling that it gave in connection with the merger of ITT and the Hartford Fire Insurance Company. ITT says that it will seek judicial review of the revocation. N. Y. Times, March 7, 1974, at 1, col. 1.

Hilda Herbst initiated this action in September 1972. The complaint, which sought damages or rescission, alleged that Herbst had owned 100 shares [3] of Hartford common stock which she exchanged for 100 shares of ITT cumulative preferred stock, $2.25 convertible series N (with voting rights). In connection with this exchange, Herbst was given a prospectus dated May 26, 1970. Herbst admitted in a subsequent affidavit that on August 4, 1970, she sold the ITT preferred stock which she received in the exchange.

The prospectus stated that it was the opinion of counsel for ITT and Hartford that if ITT in its exchange offer acquired at least 80% of the outstanding Hartford common stock and if ITT acquired no Hartford common stock except in exchange for ITT voting stock, then no gain or loss to the Hartford shareholders would be recognized on their exchange for ITT preferred stock and their basis in the ITT stock would be their previous basis in the Hartford stock. ITT represented that it did not hold any Hartford common stock and that it would not acquire any Hartford common stock for cash or property other than ITT voting stock if that would affect the tax-free nature of the exchange. Herbst claims that these representations concerning the tax status of the exchange were false and misleading and that in fact ITT did own Hartford common stock which it had acquired by cash or property other than by its voting stock.

In April 1969 ITT entered into a merger agreement with Hartford. Several months prior to this agreement, ITT had purchased approximately 1.7 million shares or about 8% of the Hartford common stock. In connection with the proposed merger ITT sought from the Internal Revenue Service (IRS) a ruling that the merger would be a tax-free reorganization. The IRS held that the merger

3. The complaint stated that Herbst owned 200 shares. A later affidavit by Herbst stated that she only owned 100 shares.

would be a valid reorganization, if prior to the merger's consummation, ITT unconditionally disposed of the shares of Hartford common stock it had acquired.[4] On October 21, 1969, ITT received a supplemental IRS ruling, which stated that a proposed contract of sale between ITT and an Italian bank, Mediobanca BancadiCredito Finanziaro-S.p.A. (Mediobanca), would result in ITT's unconditional disposition of its Hartford shares.

The contract between ITT and Mediobanca was signed on November 3, 1969. At the same time Mediobanca and ITT's investment bankers, Lazard Freres & Co. (Lazard), signed an agreement, which Herbst alleges the IRS never saw before it made its ruling. Herbst claims that by reading the two contracts together it becomes apparent that ITT did not sell its Hartford stock to Mediobanca but that in fact Mediobanca was holding ITT's stock for a fee, and that, while Mediobanca held the stock, ITT retained the risks and benefits of ownership including the right to dividends and profits or losses upon sale.

The ITT-Hartford merger never became effective, for in December 1969, the Insurance Commissioner of Connecticut disapproved the plan. ITT then made arrangements to offer Hartford shareholders a voluntary exchange of their stock for ITT preferred stock. This exchange was conditional upon at least 95% of the Hartford shares being exchanged unless ITT chose to declare the exchange effective after 80% was exchanged. Apparently because the tax consequences of this plan were identical to those of the aborted merger, no effort was made to obtain a further IRS ruling. On May 23, 1970, following hearings, the Insurance Commissioner held that the proposed offer

4. Apparently, the Hartford stock, which evidently had been acquired for cash, had to be sold so that the Hartford stock ITT owned after the merger would have been exchanged "solely" for ITT voting stock. Internal Revenue Code of 1954, § 368(a)(1)(B).

was fair to Hartford shareholders and on May 26 the offer became effective. Subsequently, more than 99% of Hartford common stock shares were exchanged for ITT preferred.

Soon after this case was started Herbst moved for an order pursuant to Fed. R. Civ. P. 23(c)(1) holding that she could maintain her action as a representative of all Hartford shareholders who exchanged their stock for ITT preferred. Chief Judge Blumenfeld held that the suit could be maintained as a class action,[5] and from this order ITT appeals.

II.

In the last few years, we have passed upon the appealability of district court orders which held that a class action could not be maintained but that the individual claim of the plaintiff could proceed to trial. We have developed the "death knell" doctrine, which makes such an order "final" for purposes of appeal under 28 U. S. C. § 1291 if the individual claim is so small that plaintiff will not proceed upon it alone. We first announced this doctrine in *Eisen v. Carisle & Jacquelin*, 370 F. 2d 119 (3d Cir. 1966), *cert. denied*, 386 U. S. 1035 (1967) (Eisen I), where the district court dismissed the class action but allowed an individual claim of $70 to be continued. We said, "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was

5. The court also ordered the parties to notify the members of the class, — F. Supp. —. The plaintiff will intially bear the cost of this notice. Evidently, no notice has been sent because of this appeal.

proper under the newly amended Rule 23." 370 F. 2d at 120.

We followed this doctrine in *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969), where the individual claim was less than one thousand dollars. 406 F. 2d at 295 n. 6. But in two cases where the individual claims were very substantial, we held that the dismissal of the class action was not appealable. *City of New York v. International Pipe & Ceramics Corp.*, 410 F. 2d 295 (1969); *Caceres v. International Air Transport Association*, 422 F. 2d 141 (2d Cir. 1970). In *Korn v. Franchard Corp.* (Korn I), and *Milberg v. Western Pacific R. R.*, 443 F. 2d 1301 (2d Cir. 1971), we clarified our holdings by ruling in Korn that the dismissal of the class action was appealable when the individual claim was for $386 and in *Milberg* that the dismissal was not appealable when the individual claim was for $8500. Although the death knell doctrine has been criticized by courts that feel that no order dismissing only the class action claim should be appealable [6] and by commentators who feel all such orders should be appealable,[7] we have reiterated our adherence to the doctrine. Consequently, we dismissed an appeal because the individual claim of $7,482 was so substantial that the plaintiff would sue on that claim alone. *Shayne v. Madison Square Garden Corp.*, slip op. pp. 1565-74 (2d Cir., Jan. 22, 1974).

Here the defendant is appealing from an order holding that a class action can be maintained. Our most recent statement on whether such an order is appealable is found

6. *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925 (1972).

7. Note, Interlocutory Appeal from Orders Striking Class Action Allegations, 70 Colum. L. Rev. 1292 (1970); Note, Appealability of a Class Action Dismissal: The "Death Knell" doctrine, 39 U. Chi. L. Rev. 403 (1972).

in *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir.), *cert. granted*, 414 U. S. 908 (1973) (*Eisen III*).

Building on Judge Friendly's concurring opinion in *Korn I, supra*, 443 F. 2d at 1307, in which he suggested that the court might wish to consider a rule that would "afford equality of treatment as between plaintiffs and defendants," we said that the district court's order allowing a class action to be maintained is appealable. 479 F. 2d at 1007 n. 1.

In so saying we relied on Supreme Court cases that have given 28 U. S. C. §1291 a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). See also *Gillespie v. United States Steel Corp.*, 379 U. S. 148 (1964); *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963). We stated that an order authorizing a class action is appealable under *Cohen* because

> [it] clearly involves issues "fundamental to the further conduct of the case;" . . .
> [and] is also separable from the merits of the case; and [the] irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident.

Although other courts of appeals have held that orders authorizing class actions are not appealable,[8] we believe that *Eisen III* reached the correct result and we adhere to it. This circuit has probably been plagued by more class actions than any other circuit. As of June 30, 1973, there were 679 class actions pending in this circuit. Only

8. *Thill Securities Corp. v. New York Stock Exchange*, 469 F. 2d 14 (7th Cir. 1972); *Walsh v. City of Detroit*, 412 F. 2d 226 (6th Cir. 1969).

the Fifth Circuit had more and most of its class actions were civil rights suits which usually seek injunctive relief and are easier to manage. Administrative Office of the United States Courts, 1973 Annual Report of the Director, table 36, at II-44 to -45. The Southern District of New York alone had 523 class actions pending or almost 14% of those pending in all districts. *Id.* at II-42. We believe that immediate review of orders authorizing class actions will aid the district courts in disposing of these cases and promote the sound administration of justice.

First, as noted in *Eisen III* defendants in litigating class actions are likely to expend much money and time in defending such actions because of the enormous damages sought by the representatives of the class. Also the representation features of class actions mean that both parties have to expend much effort and money in notifying members of the class, determining who is in and who has opted out, calculating damages, and the like. Furthermore, the district courts, if cases go beyond initial proceedings, themselves must exercise more effort in supervising such actions than they would in individual cases. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S. D. N. Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U. S. 871 (1971). Rule 23(e) requires them to approve any settlements and Rule 23(d) gives them the power and the responsibility of making orders determining the course of proceedings and protecting the members of the class. These gargantuan actions naturally take up infinitely more of the court's time than most other civil actions.

We believe that in the exercise of our supervisory powers over the administration of justice in the district courts it is desirable for us to review orders authorizing class actions before the parties and the district courts ex-

pend large amounts of time and money in managing them. Candor compels us to add that as appellate judges we would be reluctant to hold that a class action had been improper after the district court and the parties had expended much time and resources although we might have had serious doubts if we had reviewed the question at the inception of the action. Judicial efficiency requires that appellate review be made before the parties and district courts have spent considerable time, effort, and money, on such actions. Reviewing orders allowing class actions to proceed would determine issues "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U. S. 373, 377 (1945), and would constitute a most effective way of exercising our supervisory powers.[9]

Second, defendants in class actions often face potential damages in the millions of dollars. If damages in this case came to $5 a share, the judgment would be for approximately $110 million. As noted in *Eisen III* and as Judge Friendly noted in his Carpentier Lectures, the result is that such class actions are usually settled, often with settlements which run into the millions of dollars and are small only when compared to the potential liability. *Eisen III, supra,* 479 F. 2d at 1019; H. Friendly, Federal Jurisdiction: A General View 119-20 (1973). Often these cases are settled even though the validity of plaintiff's claims are doubtful. See *West Virginia v. Chas. Pfizer & Co., supra,* 314 F. Supp. at 741-43; American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 15-17 (1972). Settlements, of course, lessen the district court's problems in administering class actions,

9. We think that there ought to be a right to appeal rather than reliance on the discretion of the distrcit court to grant the certificate under 28 U. S. C. § 1292(b).

but also mean that no appellate court will ever review the question of whether a class action was proper unless immediate review is allowed. We, therefore, conclude that we have jurisdiction to hear this appeal.[10]

III.

We now turn to the question of whether the district court properly authorized a class action here. For the sake of argument, we shall treat plaintiff's case as being grounded on § 14(e) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(e), and Rule 10b-5, 17 C. F. R. § 240. 10b-5.[11] We do so only for the purpose of determining whether the district court properly authorized the maintenance of a class action and without prejudice to any other claims that plaintiff may plead.

Because some of ITT's arguments are based on what we perceive to be misunderstandings or misstatements of plaintiff's claim, it would be helpful at the outset to state our understanding of plaintiff's theory of the case. Herbst claims that ITT should have informed the holders of Hartford stock that there was a risk that the exchange might be a taxable event because of the fraud allegedly perpetrated by ITT in getting the favorable ruling from the IRS. (So far as we know, no shareholder has actually been taxed on the exchange.) Herbst claims that if the Hartford shareholders had known all the facts, a signifi-

10. We do not decide whether defendants in general must appeal at this stage of the proceedings or whether they can wait until after judgment is entered to appeal the class action determination. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 1154 (P. Bator, D. Shapiro, P. Mishkin & H. Wechsler 2d ed. 1973).

11. The guiding principles of § 14(e) and Rule 10b-5 are the same. The difference is that § 14(e) applies only to tender offers. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F. 2d 341, 362 (2d Cir. 1973), *cert. denied*, 42 U. S. L. W. 3227 (U. S. Oct. 15, 1973).

cant number of them would not have exchanged their shares, at least at the established rate of one Hartford common share for one ITT preferred, series N. ITT would then have been compelled to give more in exchange than one share of ITT $2.25 preferred if it wished to complete its acquisition. Since ITT was offering an equal amount for each share of Hartford common, regardless of the individual shareholder's tax status, all shareholders would have benefited equally if ITT had been forced to offer more for the Hartford shares. In short, even the shareholder who did not care about the tax status of the exchange would have received more for his Hartford stock if enough shareholders did care and compelled ITT to raise its offer.

Disposing of ITT's first contentions, the class here is precise enough for class action purposes and Herbst's claims are typical of the class. The complaint defined the class as all holders of Hartford common stock who exchanged their shares for ITT preferred, which clearly identifies class members. ITT claims that Herbst's claims are not typical, because she sold her ITT preferred in the same year that she received it. Therefore, the argument runs, she cannot represent those who cared about whether the exchange was tax-free. ITT also contends that Herbst cannot represent the large, tax-exempt, institutional shareholders. As noted above, all those who exchanged their shares would have benefited from a higher price. Under Herbst's claims all shareholders, large and small, tax-exempt or not, would benefit equally and so her claim is typical. Furthermore, we do not perceive any conflict of interest between those who have retained their ITT shares and those who have since sold them. The personal interest of those who still hold ITT stock in gaining more from the exchange than they did far outweighs their concern that any award could damage ITT. *Herbst v. Able*, 47 F. R. D. 11, 15 (S. D. N. Y. 1969). Finally, we reject ITT's argu-

ment that the claim is not typical because no other class members have intervened on her side. See *Korn v. Franchard Corp.*, 456 F. 2d 1206, 1209 (2d Cir. 1972) (Korn II).[12]

Citing our decision in *List v. Fashion Park, Inc.*, 340 F. 2d 457 (2d Cir.), *cert. denied*, 382 U. S. 811 (1965), ITT next argues that common issues of fact and law do not predominate over questions affecting only individual members for purposes of Rule 23(b)(3) because reliance by each shareholder is a necessary prerequisite to his recovery. We do not agree. The district court noted that this issue was "problematic," but said that requiring proof of individual reliance was no bar to a class action since the common issues could be tried as a class action and individual damages and reliance could be tried separately if necessary. ITT asks us to reconsider, *Green v. Wolf Corp., supra*, 406 F. 2d at 301, upon which the district court relied, — F. Supp. at —, but reconsideration is unnecessary since subsequent decisions of the Supreme Court and of this court have decisively disposed of ITT's argument that individual reliance is a prerequisite to recovery. In particular, we believe that our decision in *Chris-Craft Industries, Inc. v. Piper Aircraft, Inc.*, 480 F. 2d 341 (2d Cir. 1973), *cert. denied*, 414 U. S. 910 (1973), governs here.

In *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), minority shareholders brought a class action under § 14(a) of the 1934 Act, 15 U. S. C. § 78n(a), alleging that a proxy statement sent by the management of a company which urged shareholders to vote in favor of a merger contained a material omission. A significant number of minority

12. Since there were some 18,000 shareholders in Hartford, clearly there are too many to be joined in individual actions. There is a claim that Herbst cannot be expected to protect the class adequately, but this is based on claims of inconsistent interests of which we have already disposed. No other claim is made that Herbst and her counsel will not fairly and adequately protect the class.

shareholders had to approve the merger for it to gain the necessary votes of two thirds of the outstanding shares. Mr. Justice Harlan, speaking for the Court, said that the plaintiffs need not show that the merger would have not been approved if shareholders had known the fact omitted, but only that the omission was material:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation itself, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

396 U. S. at 385.

In *Affiliated Ute Citizens v. United States*, 406 U. S. 128 (1972), the Court applied this rule in a 10b-5 case which involved the failure to disclose information that shares which the class had sold were selling for a higher price elsewhere. Mr. Justice Blackmun said:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.

406 U. S. at 153-54.

We followed the *Mills-Ute* test in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp., supra,* a case involving a contest for control of Piper Aircraft between Chris-Craft and Bangor Punta Corporation. Chris-Craft claimed, and we found, that letters sent by the Piper family which managed Piper Aircraft to shareholders contained material misstatements and omissions and that a prospectus sent by Bangor Punta to Piper shareholders in connection with its exchange offer was misleading. The prospectus listed the book value of Bangor Punta's interest in a railroad at 18.4 million dollars but did not say that Bangor Punta had attempted to sell its interest and had received a serious bid of 5 million. We held that Bangor Punta was under an obligation to disclose this to Piper shareholders, 480 F. 2d at 367-69, and since the misstatements and omissions were material we presumed that without them the Piper shareholders would not have exchanged their shares in such numbers that Bangor Punta gained majority control of Piper Aircraft.

Chris-Craft clearly governs the result here. Like *Chris-Craft* the misstatements here occurred in the context of an exchange offer and the misstatements in each case are similar. In *Chris-Craft,* Bangor Punta's statement of the book value of the railroad interest was true as far as it went but it neglected to add that there was evidence that the interest was greatly overvalued on the books and that there was a likelihood that it might be sold at a substantial loss. Here, ITT's statement of the tax consequences of the exchange and its representation that it held no Hartford common stock were true as far as they went, but they allegedly did not add that ITT, while departing with nominal ownership of its Hartford stock, had retained the equitable ownership and that there was a possibility that the IRS might consider the exchange to be a taxable event.

It makes no difference that here the plaintiff was a shareholder in the acquired company while in *Chris-Craft* the plaintiff was the corporation defeated in the contest for control. We did say in *Chris-Craft* that "[t]he fact that [Christ-Craft] was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential." 480 F. 2d at 375. But we followed that sentence with

> [i]t would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require [Chris-Craft] to prove that each individual Piper shareholder who failed to trade for [Chris-Craft's] stock, or who traded for [Bangor Punta's] stock, relied upon defendants' misrepresentations in doing so.

480 F. 2d at 375.

Here as in *Chris-Craft* and *Mills* the reliance of the individual shareholder is irrelevant. Here as in those cases plaintiff was damaged only if significant numbers of shareholders might have acted differently if they had known the truth. An individual shareholder here if he had known of the tax risk would have been forced to choose between accepting ITT's offer, which appears to have been very favorable,[13] and turning it down and becoming a minority shareholder in a company controlled by ITT. But if significant numbers of Hartford shareholders would have been reluctant to exchange at the given rate if they had known the truth, then ITT might have been forced to increase its offer to all Hartford shareholders, and all Hartford shareholders would have been damaged by its failure to disclose.

13. A share of ITT convertible preferred stock, series N, was to pay $2.25 a year in dividends. A share of Hartford common paid $1.40, $1.10, and $0.92 per share in 1969, 1968, and 1967, respectively.

As noted in *Mills* and *Chris-Craft*, it is extremely difficult to prove how shareholders in the aggregate would have reacted if they had known the whole truth. Therefore, it is appropriate for the district court to presume, as we did in *Chris-Craft*, that if there was a material misstatement, then Hartford shareholders would not have exchanged their shares at the rate offered if they had known the truth.[14] Since individual reliance is not a part of plaintiff's case, the district court did not err in holding that common issues of law and fact were predominant.

In conclusion, we believe that Chief Judge Blumenfeld did not abuse his discretion in authorizing the maintenance of a class action. Accordingly, we affirm the district court's order and remand for further proceedings.

DANAHER, *Senior Circuit Judge*, concurring (but *dubitante*):

Chief Judge Blumenfeld on May 11, 1973, issued his ruling that the instant case be maintained as a class action. The I. T. T. defendants on June 11, 1973, filed a notice of appeal as to which Herbst filed her motion to dismiss, now pending before us. Prescinding for a moment the question of appealability of an interlocutory order granting class action status, I have no problem with Part III of Judge Lumbard's opinion. That the record presents a class action situation would seem beyond question. Judge Lumbard's

14. Judge Mansfield in his separate opinion in *Chris-Craft* objected to the majority's statement that there would be "presumption of reasonable reliance" if the misstatement was material. He argued that neither *Mills* or *Ute* used this phrase and said that it raised the issue of whether defendants could rebut the presumption. He felt that the materiality of the misrepresentation established reliance as a matter of law. 480 F. 2d at 399-400. Neither the majority in *Chris-Craft* nor the Supreme Court in *Mills* or *Ute* remanded those cases for the purpose of allowing defendants to raise such a defense.

opinion on this point has been joined by Judge Mulligan, and I happily concur.[1]

Whether we have jurisdiction to review the interlocutory order presents a wholly different problem. I note that Judge Mulligan says "Although I have grave doubt that this order *granting* class action status is appealable, I am not inclined to depart from *Eisen*, III, which is now on appeal in the Supreme Court." (Italics mine).

What amounts to "grave doubt" in Judge Mulligan's view is for me a persistent perturbation. I had supposed that 28 U. S. C. §1291 would limit our review jurisdiction to "final" decisions of the district court. Had a visiting judge from the Seventh Circuit participated in this case, he would have had in mind *Thill Securities Corp. v. New York Stock Exchange*, 469 F. 2d 14, 15-16 (7 Cir. 1972). Had that visiting judge come from the Fifth Circuit, he would have looked at the impact of §1291 respecting a class action ruling as interlocutory, even after consideration of the Second Circuit cases cited in *Songy v. Coastal Chemical Corporation*, 469 F. 2d 709, 710 (5 Cir. 1972). A Ninth Circuit visiting judge would not have been oblivious respecting the Second Circuit position in light of the cases cited in footnote 3, *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F. 2d 142, and text at 144. Yet other cases are pertinent, such as *Walsh v. City of Detroit*, 412 F. 2d 226 (6 Cir. 1969) and *Hackett v. General Host Corp.*, 455 F. 2d 618 (3 Cir. 1972), *cert. denied*, 407 U. S. 925 (1972). The Seventh Circuit, only a few months ago in *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 at 1260 expressly declined to adopt and accordingly rejected the "death knell" theory originally announced in *Eisen*, I.

Our visiting judge, striving earnestly to accommodate his imported thinking to Second Circuit situations, would

1. I attach by way of Appendix Judge Blumenfield's unreported memorandum ruling on the Herbst motion for class action designation. [Appended decision omitted herein].

surely have been impressed by comments in *Caceres v. International Air Transport Association*, 422 F. 2d 141 (2 Cir. 1970). This court at 143 noted that the weight of authority prior to the 1966 amendments to Rule 23 had held that an order striking class suit allegations was not appealable under Section 1291. Again, while granting that Rule 23 amendments were indeed far-reaching, the opinion said at 144, "We do not think they were intended to change that doctrine".[2]

Judge Lumbard, *supra* at p. 2626 writes:

> We have developed the "death knell" doctrine, which makes such an order "final" for purposes of appeal under 28 U. S. C. § 1291. . . .

Quite apart from the views expressed in other circuits, Judge Feinberg observes in *Shayne v. Madison Square Garden Corporation*, — F. 2d — (2 Cir. 1974) (Sl. op., 1570):

> Conversely there have been rumblings of disapproval in our own court because the doctrine grants a right to appeal to some plaintiffs, but not to any defendants. E.g., *Eisen*, III, 479 F. 2d 1005, 1007, n. 1 . . . and the concurring opinion of then Chief Judge Friendly in *Korn, supra*, 443 F. 2d at 1307.[3]

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2. It was suggested further that for review purposes reliance might be had on 28 U. S. C. § 1292(b).

3. *Eisen, III*, 479 F. 2d at 1020, n. 28 records Judge Friendly as having said in 1972 that something "seems to have gone radically wrong with a well-intentioned effort". *Cf.* Judge Friendly's earlier comments, concurring, in *Korn v. Franchard Corp.*, 443 F. 2d 1301, 1307 (2 Cir. 1971). Perhaps what that great jurist *really* there meant was: If—if interlocutory orders denying class action status are to be appealable, conversely a defendant should be allowed to appeal from an interlocutory order *granting* such status.

I take it that footnote 1 in *Eisen*, III, *supra*, constitutes—not a holding—but a commentary on the background for the doctrine "de-

And what will we now say of *Eisen*, III? In 479 F. 2d at 1005, 1016, it was noted that

> From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action.

Without our actually quoting the various "holdings" of *Eisen*, III, we need note only the Court's conclusion, *id.*, at 1020:

> For the reasons stated in this opinion the findings and conclusions following the minihearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

Thus the death knell was sounded for *Eisen* unless the Supreme Court shall see something that we do not see.[4]

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3. (Cont'd.)
veloped" in *Eisen*, I. Perhaps footnote 1 is really an answer of sorts to the question posed by Judged Timbers, "How Did We Get Here" in *International Business Machines Corporation v. United States*, 480 F. 2d 293, 303 (2 Cir. 1973). *Shayne*, text *supra*, interprets the "doctrine" as granting "a right to appeal to some plaintiffs, *but not to any defendants*". (Emphasis added). I assume that it is clear enough that no "death knell" confronts any plaintiff where a class action designation has been accorded.

4. The *Eisen* case was argued three weeks ago. Perhaps the Court will give consideration to what Judge Friendly has said in *Weight Watchers of Phila. v. Weight Watchers Int.* (2 Cir. 1972), 455 F. 2d 770, 773-774, particularly in light of his suggestion that *Cohen* "be kept within narrow bounds, lest this exception swallow the salutary final judgment rule".

After all these years, after the expenditure of time and effort, especially by Judge Tyler, *Eisen* is back where he started. For him the bell tolled.

Some judges are by no means clear as to the law of the Second Circuit respecting jurisdiction to review Judge Blumenfeld's interlocutory order designating the instant case as a class action. The finality contemplated in Section 1291, some might say, is no less definite than the jurisdictional prerequisites, 28 U. S. C. § 1331, where class action status is sought in a diversity action. *Snyder v. Harris,* 394 U. S. 332 (1969), insisted that the required jurisdictional amounts be made to appear despite the powerful dissent by Mr. Justice Fortas at 353. *Zahn v. International Paper Co.,* 42 U. S. L. W. 4087 (1973), adhered to *Snyder* in affirming this court's opinion, 469 F. 2d 1033 (1973).

Perhaps it is in order to take a fresh look at the problem under consideration, especially in view of the "rumblings of disapproval" as reported in *Shayne, supra.* Great temerity would be required to suggest a rehearing *en banc,* particularly after a visiting senior judge has read the views of able colleagues expressed in *Zahn v. International Paper Company, supra,* 469 F. 2d at 1040 and 1041. Even so, this writer for more than thirty years [5] has viewed with great favor the resolution of intra-circuit conflicting views by resort to *en banc* consideration. Although there seems to be lacking a clearly definitive ruling of Second Circuit law to govern our problem, this writer feels constrained to submerge his own view as to the non-appealability of

5. See *Western Pacific Railroad* case, 345 U. S. 247, 252, text and note 5 (1953), and the Court's discussion, 259-260. Of course, *en banc* orders do not always please everyone. See, *e.g., Williams v. Adams* where this writer spoke for the court, Hays, *J.*, concurring, 436 F. 2d 30 (1970), reversed by *en banc* vote without further argument, 441 F. 2d 394 (1971), in turn reversed, *Adams v. Williams,* 407 U. S. 143 (1972).

Judge Blumenfeld's decision. Accordingly, despite the perturbation earlier expressed, I will defer to my colleagues and join them in their disposition of the issue under consideration.

MULLIGAN, *Circuit Judge* (concurring):

I fully agree with Judge Lumbard that the district court correctly determined that a class action here was proper. Although I have grave doubt that this order granting class action status is appealable, I am not inclined to depart from *Eisen* III which is now on review in the Supreme Court.

MAY 14 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

MOTION OF RESPONDENTS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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May 13, 1974

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Respondents.

MOTION OF RESPONDENTS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondents respectfully move for leave to file a supplemental brief, pursuant to Rule 41, to bring to the Court's attention the intervening decision of the Court of Appeals for the Second Circuit in *Kohn* v. *Royall, Koegel & Wells*, — F.2d — (2d Cir., May 3, 1974), bearing upon the decision of the Court of Appeals for the Second Circuit at bar.

May 13, 1974

Respectfully submitted,

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Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

SUPPLEMENTAL BRIEF

Petitioner previously has moved for leave to file a supplemental brief to call the Court's attention to the intervening decision in *Herbst* v. *International Telephone and Telegraph Corp.*, — F.2d — (2d Cir., April 3, 1974). Petitioner contends that in the light of *Herbst* it is evident that *Eisen III*, by a footnote, revolutionized the law of the Second Circuit in respect to the jurisdiction of appeals from orders determining that an action may be maintained as a class action.

Subsequent to its *Herbst* decision, the Court of Appeals, by another panel, in *Kohn* v. *Royall, Koegel & Wells*, — F.2d — (2d Cir., May 3, 1974)*, 1) substantially limited

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* A copy of the opinion of the Court of Appeals in *Kohn* is printed in the appendix hereto.

the *Herbst* decision; 2) made clear that footnote number 1 in *Eisen III* relating to jurisdiction of appeals from orders granting class action status was a suggestion and not a holding; and 3) substantiated the contention of respondents herein that the Court of Appeals does not require notice in any class action other than one brought under Rule 23(b)(3).

May 13, 1974

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 375—September Term, 1973.

(Argued April 15, 1974 Decided May 3, 1974.)

Docket No. 73-2049

MARGARET KOHN, individually and on behalf of all persons similarly situated,

Plaintiff-Appellee,

v.

ROYALL, KOEGEL & WELLS,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*
CLARK, *Associate Justice,** and SMITH, *Circuit Judge.*

Appeal from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, granting class action status to action alleging sex discrimination in employment practices in violation of Title VII of the Civil Rights Act of 1964.

Appeal dismissed.

NORMAN S. OSTROW, New York, New York (Rogers & Wells, New York, New York, on the

* United States Supreme Court, retired, sitting by designation.

brief; Caesar L. Pitassy, Paul M. Hopkins, William Haney, III, of counsel), *Defendant-Appellant Pro Se.*

HARRIET RABB, New York, New York (George Cooper, New York, New York, on the brief), *for Plaintiff-Appellee.*

KAUFMAN, *Chief Judge:*

Whether an order granting or denying class action status is an appealable "final" order, 28 U.S.C. § 1291, is a question that has received an inordinate amount of scrutiny by circuit courts,[1] and may, we hope, soon be resolved with some measure of certainty by the Supreme

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1 *See e.g. Herbst* v. *International Telephone and Telegraph Corp.*, slip op. at 2621 (2d Cir. April 3, 1974); *Shayne* v. *Madison Square Garden Corp.*, slip op. at 1565 (2d Cir. Jan. 22, 1974); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.), *cert. granted*, 414 U.S. 908 (1973) *(Eisen III); Korn* v. *Franchard Corp. and Milberg* v. *Western Pacific R.R.*, 443 F.2d 1301 (2d Cir. 1971); *Caceres* v. *International Air Transport Association*, 442 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) *(Eisen I); Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Graci* v. *United States*, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971) (per curiam); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969) (per curiam); *King* v. *Kansas City So. Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973) (per curiam); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Falk* v. *Dempsey-Tegeler & Co.*, 472 F.2d 142 (9th Cir. 1972); *Gerstle* v. *Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972).

Court.[2] Although such orders are interlocutory in nature, we have sustained the appealability of those denying confirmation of the class where that denial, because of the relatively small amount of the individual claim, would for all practical purposes be the "death knell of the action." *Eisen I, supra,* 370 F.2d at 121. *And compare Korn* v. *Franchard, supra* (order appealable where individual claim for $386) *with Shayne* v. *Madison Square Garden Corp., supra* (appeal dismissed where individual claim for $7,482). Aside from *Eisen III, supra,* with its rather exceptional circumstances,[3] no circuit court, however, had permitted an appeal from an order granting class standing until we did so, only one month ago, in *Herbst* v. *International Telephone and Telegraph Corp., supra.* Bolstered by that recent decision, appellant Royall, Koegel & Wells[4] [Royall, Koegel] seeks review of Judge Lasker's order granting class action status to Margaret Kohn's Title VII[5] claim of sex discrimination in that law firm's hiring and

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2 In granting certiorari in *Eisen III,* see note 1 *supra,* the Supreme Court requested the parties "to brief and argue . . . [the] jurisdiction of the Court of Appeals." 414 U.S. 908 (1973). The appeal was argued on February 25, 1974. 42 U.S.L.W. 3493 (U.S. Mar. 5, 1974).

3 Although the court in *Eisen III* noted its view that orders granting class standing were appealable, *see Eisen III, supra,* 479 F.2d at 1007 n.1, the court apparently considered its power to review Judge Tyler's order sustaining the class action allegations to flow from its retention of jurisdiction following remand of the case for reconsideration and specific findings in *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 570 (2d Cir. 1968) *(Eisen II). See Eisen III, supra,* 479 F.2d at 1007.

4 Now Rogers & Wells.

5 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

internal employment practices. Without questioning the validity of *Herbst*,[6] we find it clear beyond cavil that neither our so-called "death knell" doctrine nor the more general rubric of the *Cohen* collateral order doctrine apply, in the factual context of this case, to transform this interlocutory order granting class standing into an appealable "final" order. Accordingly, and without, of course, expressing any views on the merits of the litigation, we conclude that this appeal must be dismissed.

I.

The complaint and the affidavits submitted to Judge Lasker in connection with the motions before him provide the sparse factual record for this appeal. Margaret Kohn is a graduate of the Columbia Law School class of 1972. On November 17, 1970, during the Fall semester of her second year in law school, Kohn was among approximately 40 Columbia law students interviewed for legal positions by two members of the firm of Royall, Koegel & Wells. During the week following these preliminary interviews, Royall, Koegel invited five Columbia law students to visit its offices to continue the interviewing process. Kohn received no such invitation, nor was she offered employment by Royall, Koegel.

On May 27, 1971, Kohn filed a complaint with the New York City Commission on Human Rights alleging that Royall, Koegel's failure to hire her resulted from sex dis-

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6 Reconsideration of our "death knell" doctrine or its extension in *Herbst* would seem particularly inappropriate at this time, in light of *Eisen III's sub judice* status in the Supreme Court. *See* note 2 *supra*. *See also Shayne* v. *Madison Square Garden Corp.*, *supra*, slip op. at 1571.

crimination. Some six months later, on November 19, 1971, Kohn filed a similar complaint with the Equal Employment Opportunity Commission [EEOC]. Finally, on June 26, 1972, Kohn received a permission to sue letter from the EEOC and, on the same day, filed this action on behalf of herself and all those similarly situated. In her complaint, she claimed that Royall, Koegel had refused her employment because of her sex, as part of an ongoing pattern and practice of sex discrimination in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* She sought mandatory injunctive relief to correct past discriminatory practices in both recruitment and internal employment procedures, as well as damages for herself caused by the refusal to hire her.

In response to the complaint, Royall, Koegel moved to dismiss on the ground that Kohn had not filed a timely complaint with the EEOC, as required by statute.[7]. Two days later, on September 28, 1972, Kohn moved pursuant to Rule 11A of the Local Rules of the Southern District of New York for a determination whether the suit could proceed as a class action.

Judge Lasker denied the motion to dismiss and granted Kohn's motion for class action status. *Kohn* v. *Royall, Koegel & Wells, supra.* He found that although Kohn had not filed her EEOC complaint within the 210-day statutory period commencing December 15, 1970, the date her failure

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7 *See* Title VII, § 706(d), of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e). Although the time for filing a complaint with the EEOC was extended by a 1972 amendment to the Act, neither party claimed that the amended statute applied to this case. *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515, 517 n.1 (S.D.N.Y. 1973).

to gain employment with Royall, Koegel became a virtual certainty,[8] the refusal to hire attacked by Kohn represented an allegedly "continuing violation" of Title VII. Thus, the district court concluded, "the discriminatory pattern of which plaintiff complains [was] by definition 'fresh,'" *Kohn* v. *Royall, Koegel & Wells, supra*, 59 F.R.D. at 518, and, accordingly, the policy behind a statute of limitations —to bar stale claims—did not apply.

Turning to Kohn's motion for a class action determination, Judge Lasker concluded that Kohn's class action allegations satisfied the four-part test of Fed.R.Civ.P. 23(a). He also determined that Kohn's claim for injunctive relief fell within Fed.R.Civ.P. 23(b)(2) because Royall, Koegel had allegedly "acted on grounds generally applicable to the class [defined in the complaint as 'all women qualified for legal positions at Royall, Koegel & Wells who have been or would be denied employment because of their sex'], thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

Royall, Koegel promptly moved to amend Judge Lasker's order to permit certification as an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of the denial of Royall, Koegel's motion to dismiss for untimely filing of the EEOC

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8 Judge Lasker accepted Royall, Koegel's contention that since it was a common and well known practice for large New York law firms to extend offers of employment for the following summer by December 15, Kohn must be presumed to have known by that date, at the latest, that she would not receive an offer from Royall, Koegel. We reiterate that we do not pass judgment on this or any other aspect of the merits of this case.

complaint.[9] In addition, Royall, Koegel moved for reargument of the motion to grant class action status, questioning for the first time whether Kohn, an unsuccessful employment applicant, had standing to allege discrimination in the firm's internal employment practices—*e.g.* work allocation and promotion—which arguably affects current employees only. Judge Lasker denied both motions, *Kohn* v. *Royall, Koegel & Wells, supra*, 59 F.R.D. at 523-25—a response apparently expected by Royall, Koegel for it had already commenced processing its appeal from the district court's class action determination.[10]

II.

Since we find the threshold question of appealability to be dispositive, we turn immediately to an elucidation of the reasons for our holding. It is undisputed that an order granting or denying class standing is not a "final" order as that term has generally been construed. Nevertheless, in *Eisen I, supra*, we denied a motion to dismiss an appeal from an order denying class standing to a plaintiff whose individual claim amounted to only $70. The rationale for our decision rested on the deceptively simple premise that the effect of the order denying class standing would be to terminate that lawsuit. We could not conceive of a lawyer

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9 We note that appellant did not seek certification of the question whether class action status was properly granted. *See Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 434 (D.Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973).

10 Notice of appeal was filed in the district court on April 4, 1973. Judge Lasker's order denying the motions for certification and reargument was entered June 25, 1973.

pressing a suit where victory would mean the paltry recovery of $70. Thus, we concluded in *Eisen I* that the "interlocutory" order at issue was tantamount to an order of dismissal—the finality of which has, of course, never been questioned—and so, the "death knell" doctrine was born.

The subsequent and rather checkered history of the "death knell" doctrine, in this and other circuits, was documented most recently in two opinions of this Court, *Herbst* v. *International Telephone and Telegraph, supra,* and *Shayne* v. *Madison Square Garden Corp., supra.* In *Shayne,* Judge Feinberg recounted that history, in part, in this manner:

> The "death knell" doctrine, thus announced, has not atrophied through lack of use, e.g., *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), although it has not escaped criticism. The Third and Seventh Circuits have recently rejected the doctrine as an undue extension of the right to an appeal before final judgment.[11] *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *King* v. *Kansas City So. Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973) (per curiam). Conversely, there have been rumblings of disapproval in

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11 The Fifth Circuit, however, has apparently adopted a somewhat modified version of the "death knell" rule. *E.g., Graci* v. *United States,* 472 F.2d 124, 126 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973); *Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424, 427, n.3 (5th Cir. 1971). *See also Falk* v. *Dempsey-Tegeler & Co.*, 472 F.2d 142 (9th Cir. 1972).

> our court because the doctrine grants a right to appeal to some plaintiffs, but not to any defendants . . . .[12]

Shayne v. *Madison Square Garden Corp.*, *supra*, slip. op. at 1569-1570 (footnotes renumbered).

Shayne turned on the appealability of an order denying class standing. Despite the "rumblings" to which Judge Feinberg referred, however, we have not until quite recently been faced with the necessity of determining the appealability of orders granting class standing. To be sure, in *Korn* v. *Franchard*, *supra*, which like *Shayne*, involved an order denying class standing, then Chief Judge Friendly, in a brief concurring opinion, did express concern over the "death knell" doctrine's apparently unequal application as between plaintiffs and defendants. *Korn* v. *Franchard*, *supra*, 443 F.2d at 1307. And, in *Eisen III*, Judge Medina, accepting Judge Friendly's equality caveat, did note that the "death knell" doctrine should not be limited to orders denying class standing but rather, deserved the "practical" construction emphasized in its Supreme Court progenitors, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964). Since the *Eisen II* court had specifically "retained jurisdiction," however, the *Eisen III* court's jurisdiction to review Judge Tyler's order granting class standing did not, as we have indicated, rest on a *de novo* determination of appealability.

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12 On the other hand, the Sixth and Seventh Circuits have held that orders granting class status are not appealable. *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969) (per curiam); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972).

Appendix

In *Herbst* v. *International Telephone and Telegraph Corp., supra*, the question of appealability of an order granting class standing was squarely presented. Judge Blumenfeld had permitted Mrs. Herbst to represent a class of all Hartford Fire Insurance Company [Hartford] shareholders who had exchanged their shares for International Telephone and Telegraph Corporation [ITT] preferred stock pursuant to ITT's 1970 tender offer for Hartford—an exchange allegedly tainted by violations of the securities laws. Herbst, herself, owned only 100 of the 22 million shares of Hartford common stock exchanged. Her class action, as is usual in such cases, rested on Fed.R.Civ.P. 23(b)(3)—the predominant existence of common questions of law or fact—as, indeed, had Mr. Eisen's class action claiming antitrust violations by the odd-lot brokerage houses.

Judge Lumbard, speaking for the court, though the other members of the panel candidly expressed their doubts over the holding,[13] found Judge Blumenfeld's order appealable. In reaching this conclusion, he applied the following tripartite analysis suggested in *Eisen III*:

(1) Whether the class action determination is "fundamental to the further conduct of the case;"

(2) whether review of that order is "separable from the merits;"

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13 Judge Danaher concurred *dubitante* in a separate opinion. Judge Mulligan, also concurring in a separate opinion, expressed "grave doubt that this order granting class action status is appealable . . . [but was] not inclined to depart from *Eisen III* which is now on review in the Supreme Court." *Herbst* v. *International Telephone and Telegraph, supra*, slip op. at 2656 (Mulligan, *J.* concurring).

(3) whether that order will cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action. . . ."

See Herbst v. *International Telephone and Telegraph*, *supra*, slip. op. at 2628.

Although the opinion in *Herbst* contains little more than a mention of the first factor, Mrs. Herbst's petty share holdings support the conclusion that the order granting class standing was "fundamental to the further conduct of the case." We presume that since *Herbst* relied on *Eisen III*, which in turn had adopted Judge Friendly's "equality of treatment" standard for appealability, Judge Lumbard construed this fundamental-to-the-further-conduct requirement as applying in those cases where the *denial* of class standing would satisfy our "death knell" doctrine of effective dismissal. In such instances, an order *granting* class standing would also be "fundamental to the further conduct of the case" for, if that order were erroneous and therefore reversed on appeal, the action would for all practical purposes be at an end. We recognize, of course, that a not insubstantial number of interlocutory orders—principally those denying motions to dismiss pursuant to Fed. R.Civ.P. 12(b), or for summary judgment pursuant to Fed.R.Civ.P. 56—would, if reversed on appeal, similarly prove dispositive of the litigation. Accordingly, and without reconsidering at this time the wisdom of *Herbst*, we hold only that a necessary though not sufficient element in the appealability equation is whether the action's viability turns on the class action determination.

The second element in the *Eisen III-Herbst* appealability equation—review which is "separable from the merits

of the case"—rests squarely on the collateral order doctrine announced by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp., supra.* In formulating that doctrine, the Court faced the necessity of striking the proper balance between the inequities of deferred review, on the one hand, and the unconscionable waste of judicial resources resulting from the duplication of effort in piecemeal review, on the other. Thus, an order appealable under *Cohen* must not only be "a final disposition of a claimed right which is not an ingredient of the cause of action . . . [but one which] does not require consideration with it [*i.e.* the cause of action]." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546-47. And, although *Herbst* does not focus on the degree of separability between the issues involved in the merits of the action and those underlying the propriety of the class action determination, it is reasonable to presume that in sprawling Rule 23(b)(3) class actions, such as *Eisen* and *Herbst,* questions of notice and manageability—totally unrelated to the merits of the action—will be in the forefront. Accordingly, legal and factual issues considered at an intermediate stage of appellate review will not likely resurface on appeal from final judgment.

The third factor, "the irreparable harm to a defendant in terms of time and money spent in defending a huge class action," received by far the most attention in *Herbst.* The enormous damages sought by the class inevitably require a sizeable expenditure for defense purposes and, because of this, will often spur settlement "even though the validity of plaintiff's claims are doubtful." *Herbst* v. *International Telephone and Telegraph Corp., supra,* slip

op. at 2630. Although large damage claims are not unique to class actions, "the representation features of class actions," as Judge Lumbard noted,

> mean that both parties have to expend much effort and money in notifying members of the class, determining who is in and who has opted out, calculating damages, and the like. Furthermore, the district courts, if the cases go beyond initial proceedings, themselves must exercise more effort in supervising such actions than they would in individual cases.

Id. at 2629. We hasten to add that this additional burden, to a large extent, is limited to those class actions brought under subdivision (b)(3) of Rule 23 because it is only in those actions that the court is required to ensure that all members of the potential class are notified of the action's pendency so that they may be afforded the opportunity to opt out. Fed.R.Civ.P. 23(c)(2). Since *Herbst*, like *Eisen*, was a Rule 23(b)(3) class action, the costs of satisfying the notice requirement, both monetary and in terms of judicial resources, were of course highly relevant.

III.

Applying to this case the same three criteria which combined to favor appealability in *Herbst*, we reach the opposite conclusion here. We note that defendant-appellant, appearing *pro se*, conceded at oral argument that Kohn could reasonably be expected to continue the action in her individual capacity. In short, appellant does not dispute that the class action determination is not "fundamental to the further conduct of the case." This, we might

add, was hardly a surprising concession, for the difficulties in finding counsel willing to litigate a small damage claim do not face Kohn in her efforts to remedy the alleged violation of Title VII in the appellant's hiring and internal employment practices. *See Hackett* v. *General Host Corp., supra*, 455 F.2d at 622. A victorious plaintiff in a Title VII suit, for example, may recover costs and reasonable attorneys' fees. 42 U.S.C. § 2000e-5(k). Counsel in this type of suit, moreover, tend to be drawn from the so-called "public interest" bar and, accordingly, may consider the amount of fees to be of secondary importance.

Appellant's failure to demonstrate the "fundamental" nature of this class action determination, in our view, virtually requires dismissal of the appeal. Nevertheless, we need not rest our decision on that basis alone. Turning to the second factor, we find that review of Judge Lasker's order would take us far into the merits of Kohn's sex discrimination charge. Indeed, even a cursory glance at the principal points raised by Royall, Koegel in contesting class action status reveals the unavoidable overlap.

Point I of appellant's brief, for instance, proffers the contention that there is no common question of law or fact as required by Fed.R.Civ.P. 23(a)(2). Consideration of this argument, of course, would require us to examine not only the factual strength but the legal relevancy of Kohn's allegation of a discriminatory pattern and practice in Royall, Koegel's hiring and internal employment procedures—a claim which would otherwise seem prima facie to satisfy the common question test. Yet, the pattern and practice issue is at the very heart of the merits of this action.

Appellant also attacks the class action determination (Brief of Appellant, Point II), by claiming that Kohn will not adequately represent the class, as required by Fed.R.Civ.P. 23(a)(4), because, unlike some members of the purported class, she is not a present employee. Once again, however, were we to permit interlocutory review, we would be forced to delve into an issue—Kohn's standing to question the firm's internal employment practices—which is inextricably intertwined with the ultimate merits of Kohn's claim for relief.[14]

Nor, finally, can appellant sustain the contention that it will suffer "irreparable harm" by being forced to defend this suit as a class action. All lawsuits are potentially costly and time-consuming. Attention, therefore, must be directed to the incremental cost and time in defending the particular action if it is maintained as a class action—an insignificant amount in this case.

In contrast to *Eisen* and *Herbst*, in which a substantial cost to both the defendant and the district court would arise from compliance with the notice requirement for Rule 23(b)(3) class actions, the instant suit, brought under Rule 23(b)(2), bears, as we have noted, no such notice requirement. Moreover, even the routine litigation costs—*e.g.* pretrial discovery and trial preparation—should not be substantially greater in this instance whether Kohn proceeds

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14 Appellant's third line of attack would equally involve us in an issue fundamental to an evaluation of the merits—the applicability of the "continuing violation" theory to the facts of this case. *See* Brief of Appellant, Point III, pp. 29-32. In effect, therefore, appellant would obtain interlocutory review of an order—in this instance, its unsuccessful motion to dismiss—which is otherwise clearly not appealable at this preliminary stage in the litigation.

alone or as a class representative. Although appellant insisted at argument that the scope of the relevant evidence would be primarily confined to Kohn's own contact with the firm if she proceeded on an individual basis, we cannot agree with this circumscribed relevancy assessment. The Supreme Court, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), a private, non-class action challenging employment discrimination, stated:

> Other evidence that may be relevant to any showing of pretext [for what is in reality a discriminatory employment practice] includes . . . petitioner's general policy and practice with respect to minority employment. On . . . [this] point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (CA10 1970); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.*, and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 91-94 (1972). In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for this rejection were in fact a coverup for a racially discriminatory decision.

Id. at 804-05 (footnotes omitted).

The final judgment rule is a salutary principle of long-standing duration. *See generally* 9 J.Moore, Federal Practice ¶ 110.06 *et seq.* (2d ed. 1973). At a time when our

appellate calendars are overflowing, the incisive words of Mr. Justice Frankfurter are particularly worthy of repetition:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed.

It is readily apparent that we do not have before us one of those exceptional instances which compels disregard of the sound policy of finality. Accordingly, the appeal is dismissed.

EISEN *v.* CARLISLE & JACQUELIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73-203. Argued February 25, 1974—Decided May 28, 1974

Petitioner brought a class action under Fed. Rule Civ. Proc. 23 on behalf of himself and all odd-lot traders on the New York Stock Exchange for a certain four-year period, charging respondent brokerage firms, which handled 99% of the Exchange's odd-lot business, and respondent Exchange with violating the antitrust and securities laws. There followed a series of decisions by the District Court and the Court of Appeals. The District Court ultimately decided that the suit could be maintained as a class action, and, after finding that some two and a quarter million members of the prospective class could be identified by name and address with reasonable effort and that it would cost $225,000 to send individual notice to all of them, proposed a notification scheme providing for individual notice to only a limited number of prospective class members and notice by publication to the remainder. The District Court then held a preliminary hearing on the merits, and after finding that petitioner was "more than likely" to prevail at trial, ruled that respondents should bear 90% of the costs of the notification scheme. The Court of Appeals reversed and ordered the suit dismissed as a class action, disapproving the District Court's partial reliance on publication notice. The Court of Appeals held that Rule 23 (c)(2) required individual notice to all identifiable class members; that the District Court had no authority to hold a preliminary hearing on the merits for the purpose of allocating notice costs; that the entire notice expense should fall on petitioner; and that the proposed class action was unmanageable under Rule 23 (b)(3)(D). Petitioner contends that the Court of Appeals had no jurisdiction to review the District Court's orders, and further, that the Court of Appeals decided the above issues incorrectly. *Held:*

1. The District Court's resolution of the notice problems constituted a "final" decision within the meaning of 28 U. S. C. § 1291 and was therefore appealable as of right under that section. Pp. 169–172.

(a) Section 1291 does not limit appellate review to "those

final judgments which terminate an action . . . ," but rather the requirement of finality is to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–546. Pp. 170–172.

(b) The District Court's decision that respondents could lawfully be required to bear the costs of notice involved a collateral matter unrelated to the merits of petitioner's claims and was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it," *Cohen, supra*, at 546–547. P. 172.

2. The District Court's resolution of the notice problems failed to comply with the notice requirement of Rule 23 (c) (2). Pp. 173–177.

(a) The express language and intent of Rule 23 (c) (2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort. Here there was nothing to show that individual notice could not be mailed to each of the two and a quarter million class members whose names and addresses were easily ascertainable, and for these class members individual notice was clearly the "best notice practicable" within the meaning of Rule 23 (c) (2). Pp. 173–175.

(b) The facts that the cost of sending individual notices would be prohibitively high to petitioner, who has only a $70 stake in the matter, or that individual notice might be unnecessary because no prospective class member has a large enough stake to justify separate litigation of his individual claim, do not dispense with the individual-notice requirement, since individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case but an unambiguous requirement of Rule 23. Pp. 175–176.

(c) Adequate representation in itself does not satisfy Rule 23 (c) (2), since the Rule speaks to notice as well as to adequacy of representation and requires that both be provided. Otherwise no notice at all, published or otherwise, would be required in this case. Pp. 176–177.

3. Petitioner must bear the cost of notice to the members of his class, and it was improper for the District Court to impose part of the cost on respondents. Pp. 177–179.

(a) There is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether

it may be maintained as a class action, and, indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements of the Rule. Pp. 177–178.

(b) A preliminary determination of the merits may substantially prejudice a defendant, since it is unaccompanied by the traditional rules and procedures applicable to civil trials. P. 178.

(c) Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit. Pp. 178–179.

479 F. 2d 1005, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 179.

Aaron M. Fine argued the cause for petitioner. With him on the briefs were *Mordecai Rosenfeld* and *Harold E. Kohn.*

Devereux Milburn and *William Eldred Jackson* argued the cause for respondents. With them on the briefs were *Louis L. Stanton, Jr.*, and *Russell E. Brooks.**

*Briefs of *amici curiae* urging reversal were filed by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Arnold D. Fleischer*, Assistant Attorneys General, for the Attorney General of New York; by *Israel Packel*, Attorney General, *Lawrence Silver* and *Gerry J. Elman*, Deputy Attorneys General, and *David Berger* for the Commonwealth of Pennsylvania; by *Evelle J. Younger*, Attorney General, *Anthony C. Joseph*, Assistant Attorney General, and *Michael I. Spiegel*, Deputy Attorney General, for the State of California; by *William J. Baxley*, Attorney General of Alabama, *Norman C. Gorsuch*, Attorney General of Alaska, *Gary K. Nelson*, Attorney General of Arizona, *Arthur K. Bolton*, Attorney General of Georgia, *Ed W. Hancock*, Attorney General of Kentucky, *Robert H. Quinn*, Attorney General, and *Leo Schwartz*, Special Assistant Attorney General of Massachusetts, *John C. Danforth*, Attorney General of Missouri, *Allen I. Olson*, Attorney General of North Dakota, *Richard*

MR. JUSTICE POWELL delivered the opinion of the Court.

On May 2, 1966, petitioner filed a class action on behalf of himself and all other odd-lot [1] traders on the New York Stock Exchange (the Exchange). The complaint charged respondents with violations of the antitrust and securities laws and demanded damages for petitioner and his class. Eight years have elapsed, but there has been no trial on the merits of these claims. Both the parties and the courts are still wrestling with the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Fed. Rule Civ. Proc. 23. We granted certiorari to resolve some of these difficulties. 414 U. S. 908 (1973).

J. Israel, Attorney General of Rhode Island, *Kimberly B. Cheney*, Attorney General of Vermont, *Robert I. Shevin*, Attorney General of Florida, *Richard C. Turner*, Attorney General of Iowa, *William J. Guste*, Attorney General of Louisiana, *A. F. Summer*, Attorney General of Mississippi, *Louis J. Lefkowitz*, Attorney General of New York, *Larry Derryberry*, Attorney General of Oklahoma, *Kermit A. Sande*, Attorney General of South Dakota, *Andrew P. Miller*, Attorney General of Virginia, and *David I. Shapiro* and *James vanR. Springer* for the State of Alabama et al.; by *Sheldon V. Burman* for the New York State Trial Lawyers Assn.; by *Edward I. Pollock*, *Leonard Sacks*, and *Stephen I. Zetterberg* for the California Trial Lawyers Assn.; by *Melvin L. Wulf* and *Burt Neuborne* for the American Civil Liberties Union; by *Jack Greenberg*, *James M. Nabrit III*, *Charles Stephen Ralston*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Alan B. Morrison* for the Public Citizen and Consumers Union of United States, Inc.

Briefs of *amici curiae* urging affirmance were filed by *William C. Falkenhainer* and *Rollin E. Woodbury* for Southern California Edison Co., and by *Samuel E. Gates*, *Dwight B. Buss*, *Ralph L. McAfee*, *Carl J. Schuck*, *Marvin Schwartz*, *William Simon*, *George A. Spiegelberg*, and *Philip H. Strubing* for the American College of Trial Lawyers.

[1] Odd lots are shares traded in lots of less than a hundred. Shares traded in units of a hundred or multiples thereof are round-lots.

I

Petitioner brought this class action in the United States District Court for the Southern District of New York. Originally, he sued on behalf of all buyers and sellers of odd lots on the Exchange, but subsequently the class was limited to those who traded in odd lots during the period from May 1, 1962, through June 30, 1966. 52 F. R. D. 253, 261 (1971). Throughout this period odd-lot trading was not part of the Exchange's regular auction market but was handled exclusively by special odd-lot dealers, who bought and sold for their own accounts as principals. Respondent brokerage firms Carlisle & Jacquelin and DeCoppet & Doremus together handled 99% of the Exchange's odd-lot business. S. E. C., Report of Special Study of Securities Markets, H. R. Doc. No. 95, pt. 2, 88th Cong., 1st Sess., 172 (1963). They were compensated by the odd-lot differential, a surcharge imposed on the odd-lot investor in addition to the standard brokerage commission applicable to round-lot transactions. For the period in question the differential was ⅛ of a point (12½¢) per share on stocks trading below $40 per share and ¼ of a point (25¢) per share on stocks trading at or above $40 per share.[2]

Petitioner charged that respondent brokerage firms had monopolized odd-lot trading and set the differential at an excessive level in violation of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and he demanded treble damages for the amount of the overcharge. Petitioner also demanded unspecified money damages from the Exchange for its alleged failure to regulate the differential for the protection of investors in violation of §§ 6 and 19 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78f and 78s. Finally, he requested attor-

[2] On July 1, 1966, the $40 "breakpoint" was raised to $55.

neys' fees and injunctive prohibition of future excessive charges.

A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all. Opposing counsel have therefore engaged in prolonged combat over the various requirements of Rule 23. The result has been an exceedingly complicated series of decisions by both the District Court and the Court of Appeals for the Second Circuit. To understand the labyrinthian history of this litigation, a preliminary overview of the decisions may prove useful.

In the beginning, the District Court determined that petitioner's suit was not maintainable as a class action. On appeal, the Court of Appeals issued two decisions known popularly as *Eisen I* and *Eisen II*. The first held that the District Court's decision was a final order and thus appealable. In the second the Court of Appeals intimated that petitioner's suit could satisfy the requirements of Rule 23, but it remanded the case to permit the District Court to consider the matter further. After conducting several evidentiary hearings on remand, the District Court decided that the suit could be maintained as a class action and entered orders intended to fulfill the notice requirements of Rule 23. Once again, the case was appealed. The Court of Appeals then issued its decision in *Eisen III* and ended the trilogy by denying class action status to petitioner's suit. We now review these developments in more detail.

Eisen I

As we have seen, petitioner began this action in May 1966. In September of that year the District Court

dismissed the suit as a class action. 41 F. R. D. 147. Following denial of his motion for interlocutory review under 28 U. S. C. § 1292 (b), petitioner took an appeal as of right under § 1291. Respondents then moved to dismiss on the ground that the order appealed from was not final. In *Eisen I*, the Court of Appeals held that the denial of class action status in this case was appealable as a final order under § 1291. 370 F. 2d 119 (1966), cert. denied, 386 U. S. 1035 (1967). This was so because, as a practical matter, the dismissal of the class action aspect of petitioner's suit was a "death knell" for the entire action. The court thought this consequence rendered the order dismissing the class action appealable under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949).

Eisen II

Nearly 18 months later the Court of Appeals reversed the dismissal of the class action in a decision known as *Eisen II*. 391 F. 2d 555 (1968). In reaching this result the court undertook an exhaustive but ultimately inconclusive analysis of Rule 23. Subdivision (a) of the Rule sets forth four prerequisites to the maintenance of any suit as a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." The District Court had experienced little difficulty in finding that petitioner satisfied the first three prerequisites but had concluded that petitioner might not "fairly and adequately protect the interests of the class" as required by Rule 23 (a)(4). The Court of Appeals indicated its disagreement with the

reasoning behind the latter conclusion and directed the District Court to reconsider the point.

In addition to meeting the four conjunctive requirements of 23 (a), a class action must also qualify under one of the three subdivisions of 23 (b).[3] Petitioner argued that the suit was maintainable as a class action under all three subdivisions. The Court of Appeals held the first two subdivisions inapplicable to this suit[4] and

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[3] "(b) Class Actions Maintainable.

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[4] Before the Court of Appeals, petitioner dropped the contention that the suit qualified under subdivision (b)(1)(B). The court held subdivision (b)(1)(A) inapplicable on the ground that the pro-

therefore turned its attention to the third subdivision, (b)(3). That subdivision requires a court to determine whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." More specifically, it identifies four factors relevant to these inquiries. After a detailed review of these provisions, the Court of Appeals concluded that the only potential barrier to maintenance of this suit as a class action was the Rule 23 (b)(3)(D) directive that a court evaluate "the difficulties likely to be encountered in the management of a class action." Commonly referred to as "manageability," this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. With reference to this litigation, the Court of Appeals noted that the difficulties of distributing any ultimate recovery to the class members would be formidable, though not necessarily insuperable, and commented that it was "reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." 391 F. 2d, at 567. The Court therefore directed the District Court to conduct "a further inquiry . . . in order to consider the mechanics involved in the administration of the present action." *Ibid.*

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spective class consisted entirely of small claimants, none of whom could afford to litigate this action in order to recover his individual claim and that consequently there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . ." Subdivision (b)(2) was held to apply only to actions exclusively or predominantly for injunctive or declaratory relief. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F. R. D. 69, 98, 102 (1966).

Finally, the Court of Appeals turned to the most imposing obstacle to this class action—the notice requirement of Rule 23 (c)(2). The District Court had held that both the Rule and the Due Process Clause of the Fifth Amendment required individual notice to all class members who could be identified. 41 F. R. D., at 151. Petitioner objected that mailed notice to the entire class would be prohibitively expensive and argued that some form of publication notice would suffice. The Court of Appeals declined to settle this issue, noting that "[o]n the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom the action is stated to be commenced and maintained." 391 F. 2d, at 569.

The outcome of *Eisen II* was a remand for an evidentiary hearing on the questions of notice, manageability, adequacy of representation, and "any other matters which the District Court may consider pertinent and proper." *Id.*, at 570. And in a ruling that aroused later controversy, the Court of Appeals expressly purported to retain appellate jurisdiction while the case was heard on remand.

Eisen III

After it held the evidentiary hearing on remand, which together with affidavits and stipulations provided the basis for extensive findings of fact, the District Court issued an opinion and order holding the suit maintainable as a class action. 52 F. R. D. 253 (1971). The court first noted that petitioner satisfied the criteria identified by the Court of Appeals for determining adequacy of representation under Rule 23 (a)(4). Then it turned to the more difficult question of manageability. Under this general rubric the court dealt with problems of the com-

putation of damages, the mechanics of administering this suit as a class action, and the distribution of any eventual recovery. The last-named problem had most troubled the Court of Appeals, prompting its remark that if "class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue." 391 F. 2d, at 567. The District Court attempted to resolve this difficulty by embracing the idea of a "fluid class" recovery whereby damages would be distributed to future odd-lot traders rather than to the specific class members who were actually injured. The court suggested that "a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted." 52 F. R. D., at 265. The need to resort to this expedient of recovery by the "next best class" arose from the prohibitively high cost of computing and awarding multitudinous small damages claims on an individual basis.

Finally, the District Court took up the problem of notice. The court found that the prospective class included some six million individuals, institutions, and intermediaries of various sorts; that with reasonable effort some two million of these odd-lot investors could be identified by name and address; [5] and that the names and addresses of an additional 250,000 persons who had participated in special investment programs involving

[5] These two million traders dealt with brokerage firms who transmitted their odd-lot transactions to respondents Carlisle & Jacquelin and DeCoppet & Doremus via teletype. By comparing the odd-lot firms' computerized records of these teletype transactions and the general-services brokerage firms' computerized records of all customer names and addresses, the names and addresses of these two million odd-lot traders can be obtained.

odd-lot trading[6] could also be identified with reasonable effort. Using the then current first-class postage rate of six cents, the court determined that stuffing and mailing each individual notice form would cost 10 cents. Thus individual notice to all identifiable class members would cost $225,000,[7] and additional expense would be incurred for suitable publication notice designed to reach the other four million class members.

The District Court concluded, however, that neither Rule 23 (c)(2) nor the Due Process Clause required so substantial an expenditure at the outset of this litigation. Instead, it proposed a notification scheme consisting of four elements: (1) individual notice to all member firms of the Exchange and to commercial banks with large trust departments; (2) individual notice to the approximately 2,000 identifiable class members with 10 or more odd-lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members selected at random; and (4) prominent publication notice in the Wall Street Journal and in other newspapers in New York and California. The court calculated that this package would cost approximately $21,720.

The only issue not resolved by the District Court in its first opinion on remand from *Eisen II* was who should bear the cost of notice. Because petitioner understandably declined to pay $21,720 in order to litigate an action

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[6] In the period from May 1962 through June 1968, 100,000 individuals had odd-lot transactions through participation in the Monthly Investment Plan operated by the Exchange and 150,000 persons traded in odd lots through participation in a number of payroll deduction plans operated by Merrill Lynch, Pierce, Fenner & Smith,

[7] Adjusting this figure to reflect the subsequent 4¢ increase in first-class postage would yield a figure of $315,000.

involving an individual stake of only $70, this question presented something of a dilemma:

> "If the expense of notice is placed upon [petitioner], it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, Eisen II at 563. On the other hand, if costs were arbitrarily placed upon [respondents] at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in [respondents'] passing on to their customers, including many of the class members in this case, the expenses of defending these actions." 52 F. R. D., at 269.

Analogizing to the laws of preliminary injunctions, the court decided to impose the notice cost on respondents if petitioner could show a strong likelihood of success on the merits, and it scheduled a preliminary hearing on the merits to facilitate this determination. After this hearing the District Court issued an opinion and order ruling that petitioner was "more than likely" to prevail at trial and that respondents should bear 90% of the cost of notice, or $19.548. 54 F. R. D. 565, 567 (1972).

Relying on the purported retention of jurisdiction by the Court of Appeals after *Eisen II*, respondents on May 1, 1972, obtained an order directing the clerk of the District Court to certify and transmit the record for appellate review. Subsequently, respondents also filed a notice of appeal under 28 U. S. C. § 1291. Petitioner's motion to dismiss on the ground that the appeal had not been taken from a final order was denied by the Court of Appeals on June 29, 1972.

On May 1, 1973, the Court of Appeals issued *Eisen III*. 479 F. 2d 1005. The majority disapproved the District Court's partial reliance on publication notice, holding that Rule 23 (c)(2) required individual notice to all identifiable class members. The majority further ruled that the District Court had no authority to conduct a preliminary hearing on the merits for the purpose of allocating costs and that the entire expense of notice necessarily fell on petitioner as representative plaintiff. Finally, the Court of Appeals rejected the expedient of a fluid-class recovery and concluded that the proposed class action was unmanageable under Rule 23 (b)(3)(D). For all of these reasons the Court of Appeals ordered the suit dismissed as a class action. One judge concurred in the result solely on the ground that the District Court had erred in imposing 90% of the notice costs on respondents. Petitioner's requests for rehearing and rehearing en banc were denied. 479 F. 2d, at 1020.

Thus, after six and one-half years and three published decisions, the Court of Appeals endorsed the conclusion reached by the District Court in its original order in 1966—that petitioner's suit could not proceed as a class action. In its procedural history, at least, this litigation has lived up to Judge Lumbard's characterization of it as a "Frankenstein monster posing as a class action." *Eisen II*, 391 F. 2d, at 572.

II

At the outset we must decide whether the Court of Appeals in *Eisen III* had jurisdiction to review the District Court's orders permitting the suit to proceed as a class action and allocating the cost of notice. Petitioner contends that it did not. Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the orders in question constituted a "final"

decision within the meaning of 28 U. S. C. § 1291 [8] and were therefore appealable as of right under that section; and, second, that the Court of Appeals in *Eisen II* expressly retained jurisdiction pending further development of a factual record on remand and that consequently no new jurisdictional basis was required for the decision in *Eisen III*. Because we agree with the first ground asserted by respondents, we have no occasion to consider the second.

Restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy. While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.[9] We know, of course, that § 1291 does not

[8] Section 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[9] As long ago as 1892 the Court complained: "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio R. Co.*, 146 U. S. 536, 544–545. In the intervening years the difficulty of resolving such questions has not abated. As Mr. Justice Black commented in *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 152 (1964), "whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."

limit appellate review to "those final judgments which terminate an action . . . ." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545 (1949), but rather that the requirement of finality is to be given a "practical rather than a technical construction." *Id.*, at 546. The inquiry requires some evaluation of the competing considerations underlying all questions of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511 (1950) (footnote omitted).

We find the instant case controlled by our decision in *Cohen* v. *Beneficial Loan Corp., supra.* There the Court considered the applicability in a federal diversity action of a forum state statute making the plaintiff in a stockholder's derivative action liable for litigation expenses, if ultimately unsuccessful, and entitling the corporation to demand security in advance for their payment. The trial court ruled the statute inapplicable, and the corporation sought immediate appellate review over the stockholder's objection that the order appealed from was not final. This Court held the order appealable on two grounds. First, the District Court's finding was not "tentative, informal or incomplete," 337 U. S., at 546, but settled conclusively the corporation's claim that it was entitled by state law to require the shareholder to post security for costs. Second, the decision did not constitute merely a "step toward final disposition of the merits of the case . . . ." *Ibid.* Rather, it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. The Court summarized its conclusion in this way:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action,

too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

Analysis of the instant case reveals that the District Court's order imposing 90% of the notice costs on respondents likewise falls within "that small class." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in *Cohen*, the District Court's judgment on the allocation of notice costs was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it," 337 U. S., at 546–547, and it was similarly appealable as a "final decision" under § 1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23 (c)(2) in a way that would permit petitioner's suit to proceed as a class action.[10]

III

Turning to the merits of the case, we find that the District Court's resolution of the notice problems was

[10] As explained in Part III of this opinion, we find the notice requirements of Rule 23 to be dispositive of petitioner's attempt to maintain the class action as presently defined. We therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction.

erroneous in two respects. First, it failed to comply with the notice requirements of Rule 23 (c)(2), and second, it imposed part of the cost of notice on respondents.

A

Rule 23 (c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*" [11] We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

The Advisory Committee's Note to Rule 23 reinforces this conclusion. See 39 F. R. D. 69, 98 (1966). The Advisory Committee described subdivision (c)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." *Id.*, at 106–107. The

[11] Emphasis added. Subdivision (c)(2) provides in full:

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Committee explicated its incorporation of due process standards by citation to *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and like cases.

In *Mullane* the Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement of accounts. The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. It further stated that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, at 314. The Court continued:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.*, at 315.

The Court then held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known.[12] In such cases, "the reasons

[12] The Court's discussion of the inadequacies of published notice bears attention:

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the

disappear for resort to means less likely than the mails to apprise them of [an action's] pendency." *Id.*, at 318.

In *Schroeder* v. *City of New York*, 371 U. S. 208 (1962), decided prior to the promulgation of amended Rule 23, the Court explained that *Mullane* required rejection of notice by publication where the name and address of the affected person were available. The Court stated that the "general rule" is that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable . . . ." *Id.*, at 212–213. The Court also noted that notice by publication had long been recognized as a poor substitute for actual notice and that its justification was " 'difficult at best.' " *Id.*, at 213.

Viewed in this context, the express language and intent of Rule 23 (c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort. In the present case, the names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each. For these class members, individual notice is clearly the "best notice practicable" within the meaning of Rule 23 (c)(2) and our prior decisions.

Petitioner contends, however, that we should dispense with the requirement of individual notice in this case, and he advances two reasons for our doing so. First, the prohibitively high cost of providing individual notice to 2,250,000 class members would end this suit as a class action and effectively frustrate petitioner's attempt to vindicate the policies underlying the antitrust and se-

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notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." 339 U. S., at 315.

curities laws. Second, petitioner contends that individual notice is unnecessary in this case, because no prospective class member has a large enough stake in the matter to justify separate litigation of his individual claim. Hence, class members lack any incentive to opt out of the class action even if notified.

The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 39 F. R. D., at 99, 105–106. Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.[13]

Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much, for it

[13] Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. We therefore conclude that Rule 23 (c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.[14]

B

We also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class. The District Court reached the contrary conclusion and imposed 90% of the notice cost on respondents. This decision was predicated on the court's finding, made after a preliminary hearing on the merits of the case, that petitioner was "more than likely" to prevail on his claims. Apparently, that court interpreted Rule 23 to authorize such a hearing as part of the determination whether a suit may be maintained as a class action. We disagree.

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on

[14] We are concerned here only with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3). By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2). Petitioner's effort to qualify his suit as a class action under subdivisions (b)(1) and (b)(2) was rejected by the Court of Appeals. See n. 4, *supra*.

behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ." In short, we agree with Judge Wisdom's conclusion in *Miller* v. *Mackey International*, 452 F. 2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.*, at 427.

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.[15] Where, as here, the relationship between the parties is truly ad-

[15] See, *e. g.*, *Dolgow* v. *Anderson*, 43 F. R. D. 472, 498–500 (EDNY 1968). We, of course, express no opinion on the proper allocation of the cost of notice in such cases.

versary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.

Petitioner has consistently maintained, however, that he will not bear the cost of notice under subdivision (c)(2) to members of the class as defined in his original complaint. See 479 F. 2d, at 1008; 52 F. R. D., at 269. We therefore remand the cause with instructions to dismiss the class action as so defined.[16]

The judgment of the Court of Appeals is vacated and the cause remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting in part.

While I am in general agreement with the phases of this case touched on by the Court, I add a few words because its opinion does not fully explore the issues which will be dispositive of this case on remand to the District Court.

Fed. Rule Civ. Proc. 23 (c)(4) provides, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

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[16] The record does not reveal whether a smaller class of odd-lot traders could be defined, and if so, whether petitioner would be willing to pay the cost of notice to members of such a class. We intimate no view on whether any such subclass would satisfy the requirements of Rule 23. We do note, however, that our dismissal of the class action as originally defined is without prejudice to any efforts petitioner may make to redefine his class either under Rule 23 (c)(4) or Fed. Rule Civ. Proc. 15.

As Judge Oakes, speaking for himself and Judge Timbers, said below:

> "The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified." 479 F. 2d 1005, 1023 (dissenting from denial of rehearing en banc).

Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage houses.[1] The possibilities, though not infinite, are numerous.

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[1] The parties and courts below concentrated on whether a class action could be sustained on behalf of all 6 million odd-lot investors, so that the record is limited in information bearing on what manageable subclasses could be created.

There is, nonetheless, indication that certain subclasses might be economically manageable. Counsel for respondent Carlisle & Jacquelin stated in oral argument before the Court of Appeals that 100,000 shareholders participate in his client's Monthly Investment Plan, and that Carlisle & Jacquelin corresponds with those investors. Merrill Lynch corresponds with 150,000 people participating in a payroll deduction investment plan. Whether Eisen or any other plaintiff who may come forward to intervene fits in such a subclass, we do not know. But if brokerage houses correspond regularly in the course of business with such odd-lot investors, the marginal cost of providing the individual notice required by Rule 23 (c) (2) might be nothing more than printing and stuffing an additional sheet of paper in correspondence already being sent to the investor, or perhaps only programing a computer to type an additional paragraph at the bottom of monthly or quarterly statements regularly mailed by the brokers.

A subclass of those who had engaged in numerous transactions might also be defined, so that the recovery per class member might be large enough to justifiy the cost of notice and management of the

The power to create a subclass is clear and unambiguous. Who should be included and how large it should be are questions that only the District Court should resolve. Notice to each member of the subclass would be essential under Rule 23 (c)(2); and under Rule 23 (c)(2)(A) any notified member may opt out. There would remain the question whether the subclass suit is manageable. But since the subclass could be chosen in light of the nonmanageability of the size of the class whose claims are presently before us, there is no apparent difficulty in that sense.

The statute of limitations, it is argued, has run or is about to run on many of these classes. We held in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, that the start of a class action prior to the running of the statute protects all members of the class. Whether that rule should obtain for the benefit of other members who could have been included in the subclass bringing suit, but for the manageability issue, is a question we have not decided.[2] Moreover, if the subclass sues and wins or

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action. A survey of only 4 of 14 wire firms revealed 2,000 customers with 10 or more transactions between 1962 and 1966. 52 F. R. D. 253, 259, 267 & n. 10.

By defining more definite subclasses such as those discussed, moreover, the problems inherent in distributing an eventual judgment would be reduced. Class members would be more readily identifiable, with more readily accessible transaction records and individually provable damages.

[2] In this case, the entire class was defined in the original complaint, and the defendants were put on notice within the period of limitation of their potential liability, serving the purpose of the statute of limitations even if the substantive merits were eventually to be prosecuted in the form of a subclass action with the class action held in abeyance. "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional inter-

sues and loses, questions covering the rights of members of the larger class who are not parties would be raised. These are questions we have not answered.[3] But the fact that unresolved questions of law would remain is not an insurmountable obstacle, and Rule 23 (c)(4)(B) expressly authorizes subclasses to sue in lieu of a full class. Rule 23 (c)(4)(B) may have had, as a forerunner, the proposal stated by Judge Weinstein in 1960:

> "When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all." [4]

In explanation he added:

> "Such a rule would provide six requirements for a class action: (1) a class, (2) numerous members,

venors." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 555. And see Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell L. Q. 399, 423 (1934).

[3] If the subclass lost, it is argued that other investors not members of that subclass could not be precluded from prosecuting successful suits of their own, since they had never had their day in court or necessarily even been apprised of the subclass' action. See *Hansberry* v. *Lee*, 311 U. S. 32; F. James, Civil Procedure § 11.26 (1965); 1B J. Moore, Federal Practice ¶ 0.411 [1] (1974). If the subclass won, strict application of the doctrine of mutuality of estoppel would limit the usefulness of that subclass victory in suits brought by investors not members of that subclass. See generally F. James, *supra*, § 11.31; 1B J. Moore, *supra*, ¶ 0.412 [1] (and Supp. 1973), and cases cited therein. And see Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 55–59 (1964); Note, 35 Geo. Wash. L. Rev. 1010 (1967); Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957).

[4] Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 458.

(3) common question of law or fact, (4) impracticability of joinder, (5) representative claim or defense, (6) fair and adequate protection of absentees.

"Almost any 'bond of association' in an event or status out of which a legal dispute arose is sufficient to constitute a class. The class must be numerous but need not be so large that, in itself, this factor makes it impracticable to bring them all before the court. A number of members sufficient to satisfy present Section 195 [of the New York Civil Practice Act] would satisfy the proposed rule. Size, modesty of monetary interest, inability to locate members and difficulty of obtaining jurisdiction should all be considered in determining impracticability of joinder." [5]

The Court permits Eisen to redefine his class either by amending his complaint pursuant to Fed. Rule Civ. Proc. 15, or by proceeding under Rule 23 (c)(4). While Eisen may of course proceed by amending his complaint to define a subclass, it is clear that he need not do so.[6] Definition of the subclass would properly be accomplished by order of the District Court, as permitted by Rules 23 (c)(4) and 23 (c)(1), without amendment of the complaint as filed. While the complaint alleges that

[5] *Id.*, at 458–459 (footnotes omitted).

[6] Were Eisen to be remitted to an individual action, as he would be if he refused to pay the cost of notice even to a subclass, amendment of the complaint might be called for by the District Court. Under Rule 23 (d)(4), the District Court may in some instances require that pleadings be amended to eliminate class allegations. The Advisory Committee Notes indicate that this provision is to be applied only when a suit must proceed as a nonclass, individual action, not when, as here, an appropriate class exists and the action must be prosecuted in the first instance by a subclass only because of problems of manageability. See Proposed Rules of Civil Procedure, 39 F. R. D. 69, 104.

Eisen sues on his behalf and on behalf of all purchasers and sellers of odd lots, it adds, "Plaintiff will fairly insure the adequate representation of all such persons." Problems of manageability covered by Rule 23 (b)(3)(D) arise only after issues are joined and the District Court is engaged in shaping up the litigation for a trial on the merits. If it finds that a subclass would be more appropriate, no new action need be started nor any amended complaint filed.

Rule 23 (c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

It is as plain as words can make it that the court which decides that a full class action can be maintained can alter or amend its order "before the decision on the merits." One permissible way in which the court's order may be changed is to have it "altered" as provided in Rule 23 (c)(1) by reducing the larger class to a subclass as provided in the same subsection—Rule 23 (c)(4)(B). The prerequisites of a class cause of action are described in Rule 23 (a). In the instant case that hurdle has been passed and we are at the stage of notice requirements and manageability. Not an iota of change is made in the cause of action by restricting it to a subclass.

The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation. See *Dolgow* v. *Anderson*, 43 F. R. D. 472, 481–482 (EDNY); *Green* v. *Wolf Corp.*, 406 F. 2d 291, 298 (CA2), cert. denied, 395 U. S. 977. Lower federal courts have recognized their discretion to define those subclasses proper to prosecute an action without being bound by the plaintiff's

complaint. See, *e. g.*, *Dolgow* v. *Anderson*, *supra*, at 491–493; *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F. R. D. 452, 462–463 (ED Pa.). See generally 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790, p. 187; 3B J. Moore, Federal Practice ¶ 23.65. And, as Rule 23 (c)(1) clearly indicates, the courts retain both the power and the duty to realign classes during the conduct of an action when appropriate. See, *e. g.*, *Carr* v. *Conoco Plastics, Inc.*, 423 F. 2d 57, 58 (CA5), cert. denied, 400 U. S. 951; *Johnson* v. *ITT-Thompson Industries, Inc.*, 323 F. Supp. 1258, 1262 (ND Miss.); *Ostapowicz* v. *Johnson Bronze Co.*, 54 F. R. D. 465, 466 (WD Pa.); *Baxter* v. *Savannah Sugar Refining Corp.*, 46 F. R. D. 56, 60 (SD Ga.). That discretion can be fully retained only if the full class complaint is preserved when a subclass is defined to prosecute the action. The bounds of the subclass can then be narrowed or widened by order of the District Court as provided in Rule 23 (c)(1), without need to amend the complaint and without the constraints which might exist if the complaint had earlier been amended pursuant to Rule 15 to include only the subclass.

I agree with Professor Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration.[7] I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of

[7] Z. Chafee, Some Problems of Equity 149 (1950).

air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay.

The class action is one of the few legal remedies the small claimant has against those who command the status quo.[8] I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

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[8] Judge Weinstein writing in the N. Y. Law Journal, May 2, 1972, p. 4, col. 3, said:

"Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

"The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

"When the organisation of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct."

HOLDER, U. S. DISTRICT JUDGE *v.* BANKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–841. Argued April 24, 1974—Decided May 28, 1974

Certiorari dismissed as improvidently granted.

Karl J. Stipher argued the cause for petitioner. With him on the brief were *Frederick P. Bamberger, Harold H. Bredell, John E. Early, Erle A. Kightlinger, R. M. Kroger, C. Wendell Martin, James L. Miller, Wayne C. Ponader, Floyd W. Burns, C. B. Dutton, Thomas M. Scanlon, Ben J. Weaver, Howard S. Young, Jr.*, and *Norman P. Rowe.*

Morton Stavis argued the cause for respondent. With him on the brief were *William M. Kunstler* and *Doris Peterson.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE POWELL took no part in the consideration or decision of the case.

**Melvin L. Wulf, Leon Friedman,* and *Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.